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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

DAKOTA GASIFICATION COMPANY AND
UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, notwithstanding the strong federal policy favoring arbitration, a forum selection clause in one contract may be invoked to force litigation of severable claims that arise under entirely separate but related contracts which themselves explicitly require arbitration.

LIST OF ALL PARTIES

The parties include those listed in the caption of the case and the three other Appellees in the Court of Appeals below, ANR Pipeline Company, Natural Gas Pipeline Company of America, and Tennessee Gas Pipeline Company. A list of Transcontinental Gas Pipe Line Corporation's parent company and its non-wholly owned subsidiaries (with a parenthetical statement of its ownership interest) is set forth below:

Transco Energy Company (parent corporation)
ACEC Power Systems, Inc. (50%)
Border Gas, Inc. (10%)
ESBI Energy Company (50%)
Enfuels Corporation (37.5%)
Fleet Star, Inc. (50%)
Fleet Star of Texas, L.C. (50%)
Hopewell Cogeneration, Inc. (25%)
NESP Supply Corp. (33⅓%)
Trans-Jeff Chemical Corp. (50%)
TRANSTAR Technologies, L.C. (50%)
TREN-FUELS Gas and Equipment, Inc. (75%)
Tren-Fuels, Inc. (95.5%)
Tubexpress, Inc. (50%)

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PETITION FOR WRIT OF CERTIORARI

Transcontinental Gas Pipe Line Corporation ("Transco") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 964 F.2d 732 (8th Cir. 1992). The opinion of the United States District Court for the District of North Dakota (App. B) is not officially reported.

The opinion rendered in a related case by the United States District Court for the Southern District of Texas (App. C) is reported at 782 F. Supp. 336 (S.D. Tex. 1991). The order of the United States Court of Appeals for the Fifth Circuit dismissing the appeal from that decision (App. D) is not officially reported.

JURISDICTION

The court of appeals rendered its opinion and entered judgment on May 4, 1992 (App. A). A timely petition for rehearing was denied on June 25, 1992 (App. E). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 2, 3, and 4 of the Federal Arbitration Act, 9 U.S.C. §§ 2, 3, and 4 provide as follows:

Section 2.

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3.

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4.

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28,

in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE

This case involves disputes arising under two contracts for the purchase and transportation of synthetic gas from a coal gasification plant in North Dakota to points outside that state.[1] Each contract includes a provision obligating the parties to submit such disputes to binding arbitration; the contracts unquestionably involve "commerce" within the meaning of § 1 of the Federal Arbitration Act (the "Arbitration Act"), 9 U.S.C. § 1; and it is undisputed that the Arbitration Act applies. The Eighth Circuit nonetheless refused to enforce the contracts' arbitration clauses as required by the Arbitration Act, holding instead that they had been silently nullified by a third contract that contains a forum selection clause for the litigation of disputes that may arise under that contract (but only under that contract).

The decision below conflicts not only with the "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), but also with the Third Circuit's holding in *Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 406-07 (3d Cir. 1987), that any ambiguity created by the presence of both an arbitration and a forum selection clause must be resolved in favor of arbitration. Certiorari should be granted to resolve these conflicts and to correct the Eighth Circuit's departure from the requirements of the Arbitration Act. Additionally, because of the well-established precedents of this Court regarding the presumption of enforceability of arbitration agreements under the Act, this case is ripe for summary reversal.

1. The Underlying Contracts

On January 29, 1982, Great Plains Gasification Associates ("Great Plains"), then the owner of the North Dakota coal

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[1] "Gasification" refers to the process of converting lignite coal to methane.

gasification plant, executed four virtually identical gas purchase agreements with four different pipelines — Transco, ANR Pipeline Company ("ANR"), Natural Gas Pipeline Company of America ("Natural"), and Tennessee Gas Pipeline Company ("Tennessee"). Each gas purchase contract contained an identical covenant to arbitrate.[2]

Great Plains had acquired the gasification plant with the help of a mortgage guaranteed by the United States Department of Energy ("DOE"). To protect its interest as guarantor, DOE required all four pipelines to join in a single pipeline affiliates agreement, also dated January 29, 1982 (App. H). This agreement provided, *inter alia,* that if Great Plains defaulted on the mortgage and DOE foreclosed, the pipelines would reinstate their gas purchase agreements with the Secretary of Energy or his designee. App. H at 2. Under this agreement, the parties consented to the jurisdiction of any federal district court in either North Dakota or the District of Columbia "in connection with any suit to enforce the rights of the Secretary hereunder." App. H at 10.

Seventeen months later, on June 30, 1983, Great Plains executed four virtually identical synthetic gas transportation agreements with each of the four pipelines. Each synthetic gas transportation agreement contained a covenant to arbitrate disputes arising thereunder, phrased in essentially the same terms as the counterpart arbitration clauses in the gas purchase agreements. App. G at 11-12.

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[2] "Any dispute between the parties arising out of this Agreement (including failure to agree on matters stated to be determined by mutual agreement) shall be tried by arbitration pursuant to the Rules of the American Arbitration Association in effect at the time of such arbitration, except as may be provided herein. . . . The decision of the arbitrators, which shall be arrived at by a majority vote, shall be binding upon the parties, and judgment may be rendered thereon by any court having jurisdiction thereof." App. F at 24.

2. Events Leading to Litigation

Great Plains defaulted on its note in 1985. DOE foreclosed on the plant, and the United States successfully brought suit to enforce DOE's rights under the pipeline affiliates agreement, including the right to reinstate the gas purchase agreements and the synthetic gas transportation agreements. See *United States v. Great Plains Gasification Assocs.*, 819 F.2d 831 (8th Cir. 1987); *United States v. Great Plains Gasification Assocs.*, 813 F.2d 193 (8th Cir. 1987), *cert. denied sub nom. ANR Gasification Properties Co. v. United States*, 484 U.S. 924 (1987). For a time thereafter, DOE operated the gasification plant and sold the output to the pipelines pursuant to the gas purchase and transportation agreements.

DOE sold the gasification plant to respondent Dakota Gasification Company ("Dakota") in 1988. The sale effected an assignment to Dakota of DOE's rights and obligations under the gas purchase and transportation agreements. DOE did not, however, assign its rights under the pipeline affiliates agreement.

Disputes arose before and after Dakota took over the plant concerning, *inter alia*, the proper calculation of prices and charges under the gas purchase and transportation agreements — the agreements containing covenants to arbitrate and to which Dakota now is a party. No similar or other dispute arose between Dakota and the pipelines under the pipeline affiliates agreement — the agreement that does not contain a covenant to arbitrate and to which Dakota is not a party.

3. Proceedings Below

On October 12, 1990, Dakota, ignoring the arbitration clauses in the gas purchase agreements, filed this suit against the pipelines in the United States District Court for the District of North Dakota, seeking damages and declaratory and injunctive relief with respect to alleged violations or threatened violations of those agreements. Jurisdiction was invoked under 28 U.S.C. § 1332.

The complaint later was amended, and then a second amended complaint was filed adding the United States as a plaintiff and adding claims under the synthetic gas transportation agreements. Although admitting that its interest was "somewhat contingent," the United States justified its intervention under F. R. Civ. P. 24(a) on the ground that, as Dakota's secured creditor, it has an interest in the property or transaction. (U.S.'s Mem. Supp. Mot. Intervene at 8.)

Invoking § 3 of the Arbitration Act, the pipelines moved to stay or dismiss the lawsuit pending arbitration in accordance with the terms of the agreements. Meanwhile, Transco had filed a demand for arbitration with the American Arbitration Association in Houston, Texas, where Transco's principal office is located.[3] Transco then sued Dakota in the United States District Court for the Southern District of Texas to compel such arbitration, as it was authorized to do by § 4 of the Arbitration Act. See *Municipal Energy Agency of Mississippi v. Big Rivers Elec. Corp.*, 804 F.2d 338, 344 (5th Cir. 1986).

The district court in North Dakota dismissed this case on January 11, 1991, "based on the contract language requiring arbitration." App. B at 5. On May 31, 1991, the district court in Texas entered an order compelling Dakota to submit to arbitration. App. C at 13. Dakota attempted to appeal from both orders. The Fifth Circuit dismissed the appeal from the Texas decision because no separate final judgment had been entered. App. D. Six months later, however, the Eighth Circuit, by a two-to-one majority, reversed the judgment of the North Dakota district court.

Perceiving a conflict between the arbitration clauses in the gas purchase and transportation agreements and the forum selection clause in the pipeline affiliates agreement, the panel majority wrote that the "case turns on conflicting provisions from two

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[3] All four pipelines initiated arbitration proceedings.

separate agreements." App. A at 5. Noting that the gas purchase agreements and the pipeline affiliates agreement had been executed on the same day (although by different parties), and ignoring the fact that the synthetic gas transportation agreements had been executed seventeen months later, the majority reasoned that their purportedly "simultaneous execution" required the documents be read together. *Id.* at 8-9. But then, instead of reading the agreements together — that is, instead of reading their various provisions to form a harmonious whole — the court concluded that the forum selection clause in the pipeline affiliates agreement completely nullified the arbitration clauses in the gas purchase and transportation agreements.

The panel majority gave two reasons for this conclusion. *First,* the majority believed that the forum selection clause in the pipeline affiliates agreement granted DOE the right to litigate any dispute it might have with the pipelines, not only under that agreement but under the gas purchase agreements as well. App. A at 7. *Second,* the majority believed that Dakota, as DOE's assignee under the gas purchase agreements, also was entitled to disregard the arbitration clauses in those agreements. *Id.* at 8. In short, the court held that the arbitration clauses in the gas purchase agreement had been nullified by the presence of a forum selection clause in the pipeline affiliates agreement.

As Judge Magill observed in the dissenting opinion, "the majority has ignored the federal policy favoring arbitration." App. A at 12. He continued:

> The Pipeline Affiliates Agreement does not, by any stretch of the imagination, clearly provide that, upon reinstatement of the Gas Purchase Agreements by the Secretary, the forum selection clause will replace the arbitration clause in these agreements. As noted, it is, at most, ambiguous. Thus, the federal policy favoring arbitration mandates that this ambiguity be resolved in favor of enforcing the arbitration clauses. *See Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 406-07 (3d Cir. 1987) (resolving a

> dispute between an arbitration clause and a forum selection clause in favor of arbitration even though the forum selection clause did not serve an independent purpose as it does in this case).

Id. at 12-13 (footnote omitted).

REASONS FOR GRANTING THE WRIT

The Arbitration Act stands "as a congressional declaration of a liberal federal policy favoring arbitration." *Moses H. Cone,* 460 U.S. at 24. *See also, e.g., Perry v. Thomas,* 482 U.S. 483, 489 (1987); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 226 (1987). This "national policy favoring arbitration," *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984), requires that federal courts "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221 (1985). *See also, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 481 (1989). In this case, however, the Eighth Circuit altogether ignored the "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter,* 470 U.S. at 217.

The panel majority below made not the slightest effort to reconcile its holding with this Court's decisions requiring that "ambiguities as to the scope of the arbitration clause [be] resolved in favor of arbitration." *Volt Info. Sciences Inc. v. Board of Trustees,* 489 U.S. 468, 476 (1989). *See also, e.g., Moses H. Cone,* 460 U.S. at 24-25. Indeed, the majority opinion reads as if this Court's considerable jurisprudence under the Arbitration Act either does not exist or does not matter. Moreover, by using the forum selection clause in the pipeline affiliates agreement to nullify the federally protected and congressionally favored arbitration clauses in the gas purchase and transportation agreements, the Eighth Circuit has placed itself in square conflict with the Third Circuit, which has held that any doubts created by such a forum selection clause "must be resolved in favor of arbitrability." *Patten Securities,* 819 F.2d at 407. Certiorari should be granted to

resolve that conflict and to correct the Eighth Circuit's heedless disregard of this Court's decisions under the Arbitration Act.

1. The circuits are in direct conflict. The Eighth Circuit in this case has held that a forum selection clause in one agreement nullifies an otherwise enforceable contractual obligation to submit to arbitration contained in another agreement. In stark contrast, the Third Circuit in *Patten Securities* held that such a forum selection clause must be construed and applied in a manner that does not destroy the parties' rights to arbitration. The Third Circuit reasoned as follows:

> "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or like defense to arbitrability." A forum selection clause, on the other hand, does not enjoy such federal favor. In fact, a forum selection clause "should be unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought." Thus the forum selection clause must be scrutinized carefully, and if doubts arise as to whether this dispute is arbitrable or not, such doubts must be resolved in favor of arbitrability.

Patten Securities, 819 F.2d at 407 (citations omitted).

The present case is analytically indistinguishable from *Patten Securities* — except that, if anything, this is a considerably stronger case for arbitration. In *Patten Securities,* the question was whether a contractual forum selection clause, which contained no explicit reference to arbitration, constituted waiver of the right, established by the by-laws of the National Association of Securities Dealers, to arbitrate any disputes that might arise under that contract. Here, the question is whether a similar contractual forum selection clause constitutes a waiver of rights, established by the terms of other contracts, to arbitrate any disputes that may arise under those other contracts. If, as the

Third Circuit held, a forum selection clause is not effective to waive the right to arbitrate disputes arising under the *same* contract, *a fortiori* it does not nullify the separately established right to arbitrate disputes arising under other contracts.

Moreover, the Eighth Circuit treated this case as if it is factually, as well as analytically, on all fours with *Patten Securities*. At bottom, therefore, the court's holding is that a forum selection clause in one contract trumps an arbitration clause in a separate agreement, even where it is possible to read the documents together and to harmonize the two provisions. That result is precisely contrary to *Patten Securities*.

It also conflicts in principle with decisions of the District of Columbia and Fifth Circuits. Those courts have held that contracting parties must arbitrate all disputes arising under agreements in which covenants to arbitrate appear, even if other related and simultaneously executed agreements contain no such covenants. *See Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990); *Travel Consultants, Inc. v. Travel Management Corp.*, 367 F.2d 334, 338 (D.C. Cir. 1966). The panel majority here, however, used simultaneous execution as an excuse for refusing to enforce a binding commitment to arbitration.

2. *The decision below is plainly incorrect.* The Eighth Circuit purported to rest its decision on common law principles of contract construction. Those principles, however, go no further than to require, arguably, that the pipeline affiliates agreement and the gas purchase and transportation agreements be read together as a single contractual undertaking. Merely reading the agreements together in that way should have been only the beginning, not the end, of the analysis. Common law principles do not dictate the content that must be given to forum selection and arbitration clauses when included in a single undertaking, and the Eighth Circuit in fact gave no reason, rooted in the common law or otherwise, for preferring the forum selection clause over the arbitration clauses.

Even restricting analysis to common law principles of contract construction, this case should have been an easy one to decide. In construing contracts, courts should, where possible, give effect to all terms; one term should not be read to nullify another when the two terms can, instead, reasonably be read to operate in harmony. Here, as Judge Magill demonstrated in his dissent, the forum selection and arbitration clauses that the majority assumed to be in conflict in fact comfortably coexist:

> [T]he correct interpretation of this language is that the Secretary has the right to litigate in the specified federal courts those claims arising from the Pipelines' breach of any covenant, representation, or warranty contained in the Pipeline Affiliates Agreement. For example, because this agreement contains a covenant that the Pipelines will reinstate the Gas Purchase Agreements, the Secretary can bring an action in federal court to enforce this promise. Once the Gas Purchase Agreements are reinstated, however, the parties must arbitrate any dispute regarding their rights and obligations under these agreements.

App. A at 10. That sensible reading of the parties' agreements in this case — a reading that would appear to be required even as a matter of common law — becomes mandatory once reference is made to the "national policy favoring arbitration." *Southland Corp.*, 465 U.S. at 10.

The Eighth Circuit fundamentally erred in failing to apply relevant principles of contract construction devolved from the Arbitration Act. Whether the parties' agreements are properly read separately or together, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone,* 460 U.S. at 24. *See also Travel Consultants,* 367 F.2d at 338. The Arbitration Act, like the policy which underlies it, requires that "any doubts should be resolved in favor of arbitration." *Moses H. Cone,* 460 U.S. at 24-25. *See also, e.g., Volt Info. Sciences,* 489 U.S. at 475. Naturally, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp.*

v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). "[A]rbitration should not be denied 'unless it can be said with assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.'" *Neal*, 918 F.2d at 37, quoting *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984). These authorities leave no doubt about the proper disposition of this case: the parties' agreements must be construed, in accordance with their plain meaning, as requiring arbitration of all disputes arising under the gas purchase and transportation agreements.

This result is, indeed, dictated by the express language of § 2 of the Arbitration Act. Section 2 provides that any written contractual provision to submit disputes arising under the contract to arbitration is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The parties here explicitly covenanted to arbitrate all disputes arising under the gas purchase and transportation agreements; and there is no basis in law or equity, nor has any been suggested, for revocation of that covenant. Section 2 would require precedence be given to the arbitration clauses even if, as is not the case here, it were impossible to harmonize them with the forum selection clause. The majority opinion failed to apply the obvious construction, set forth in the dissent, by which the clauses are compatible. This led it incongruously to decide that disputes arising under the gas purchase agreements should be directed to litigaton while it failed even to address the disputes arising under the transportation agreements. Even in that event, however, the majority failed to follow the mandate of Section 2 that compels the preference for arbitration.

Although the panel majority did not fully explain its legal rationale, it did give a hint of its true concern. The majority repeated, with apparent approval, the district court's gloomy

assessment of the practical consequences of permitting the pipelines to exercise their rights under the arbitration clauses:

> The district court . . . characterized its decision as setting the stage for "utter chaos," since it realized that its ruling would force Dakota "into four separate arbitration proceedings, in four separate locations, with separate arbitrators, [and] could produce four disparate decisions, each of which would be unappealable and final according to the contract language."

App. A at 5 (brackets in original). This concern over "utter chaos" is overblown. All four arbitrations were proceeding smoothly when the Eighth Circuit reversed the district court and ordered that the parties must litigate instead. Moreover, in order to obtain expert decision-making and avoid home-town bias, the contracting parties had deliberately chosen arbitration as the means for resolving all disputes under the gas purchase and transportation agreements. Great Plains entered into these agreements, and Dakota took assignments of them, with their eyes open, knowing that disputes could arise relating to prices and volumes and that any such disputes would be arbitrated separately as to each pipeline. Determining prices and volumes is part of the contractual scheme and there is no reason why disputes over these matters cannot be resolved properly in arbitration.

As the district court recognized in this case, judicial concern about "utter chaos" cannot, under this Court's decisions, override the parties' explicit agreement to arbitrate. "Congress has . . . mandated the enforcement of arbitration agreements." *Southland Corp.*, 465 U.S. at 10. Such enforcement was the "preeminent concern of Congress in passing the Act." *Dean Witter*, 470 U.S. at 221. Consequently, the Arbitration Act "leaves no place for the exercise of discretion." *Id.* at 218. This means, in particular, that agreements to arbitrate must be enforced "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217. It was

obvious error to refuse to enforce the parties' agreements to arbitrate in this case.

It should be noted, moreover, that it is the Eighth Circuit, not the parties' agreements, that has caused chaos in fact. The court's decision leaves the parties in a procedural tangle that stands in ironic contrast to the "streamlined procedures of arbitration." *Shearson/American Express,* 482 U.S. at 232. Since well before entry of the judgment below, Dakota has been, and still is, subject to an order to arbitrate issued by the United States District Court for the Southern District of Texas, and the arbitration proceeding pursuant to that order is long underway. App. C at 13. The Eighth Circuit has now put in its oar, directing that the dispute be shifted from an arbitration proceeding before experienced professionals to a jury trial in an area where Dakota is a major employer. *See* App. B at 3. The resulting standoff between two federal courts is a far cry from the prompt and efficient means of dispute resolution that Congress sought to foster when it enacted the Arbitration Act.

3. The issue is important. Arbitration is perhaps the most popular formal alternative to litigation. Professional arbitrators, unlike jurors, tend to be chosen because of their expertise in a particular subject; arbitration is especially valuable as a means of resolving complex commercial disagreements. That is why the parties in this case, like similar contractual parties in countless thousands of similar substantial commercial undertakings throughout the economy, contractually committed themselves to arbitration. Such arbitration agreements enable the commercial partners to resolve their differences more cheaply, more quickly, and, they believe, more fairly and accurately. Congress recognized these virtues when it established the "national policy favoring arbitration." *Southland Corp.,* 465 U.S. at 10.

Decisions like that below strike at the heart of the Arbitration Act. Congress' central objective "was to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Inter-*

state/Johnson Lane Corp., 111 S. Ct. 1647, 1651 (1991). Yet the Eighth Circuit, with its insinuating reference to "chaos" and its failure to furnish any principled rationale for preferring litigation to arbitration, exhibited subtle but unabated hostility of precisely the kind Congress wanted to end. "[T]he purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges." *Southland Corp.*, 465 U.S. at 13, quoting *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring). The decision below directly defeats that guiding purpose.

Unless reversed, the decision below will have important and unfortunate consequences for arbitration as an alternative means of dispute resolution. A covenant to arbitrate has been characterized as "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Parties may include both types of clauses, as the Third Circuit noted, "to dictate the location of any [judicial] action to enforce the [arbitration] award." *Patten Securities*, 819 F.2d at 407. Or, as in this case, a forum selection clause may be used when disputes arising out of one portion of the undertaking (the pipeline affiliates agreement) are to be resolved judicially and disputes arising out of other portions of the undertaking (the gas purchase and transportation agreements) are to be resolved through arbitration. Thus, the quite ordinary presence of both types of clauses in one set of documents should not and does not impose upon a reviewing court the necessity of making an either-or decision. In any event, if a court wrongly misapprehends that it is in fact faced with such a decision, the Arbitration Act dictates the choice that must be made: "Congress has . . . mandated the enforcement of arbitration agreements." *Southland Corp.*, 465 U.S. at 10.

In summary, the Eighth Circuit has decided this important issue in a manner that directly conflicts with *Patten Securities* and that also flies in the face of a long series of pronouncements by this Court concerning the proper application of the Arbitration Act. The issue presented by cases like this and *Patten Securities* can be expected to recur, especially now that the Eighth Circuit has given the green light to those who would shirk their contractual duty to arbitrate. This Court should summarily reverse the Eighth Circuit or grant certiorari to resolve the conflict and to bring the Eighth Circuit into line with established precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

A.

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, MAY 4, 1992

DAKOTA GASIFICATION COMPANY,
in its own capacity as successor-in-interest to the Department of Energy and Great Plains Gasification Associates,

United States of America, on behalf of
The Department of Energy, Appellant,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA;
ANR Pipeline Company, Michigan-Wisconsin Pipe Line Company; Transcontinental Gas Pipe Line Corporation; Tenneco Gas Pipeline Group, formerly known as Tennessee Gas Pipeline Company, Appellees.

DAKOTA GASIFICATION COMPANY,
in its own capacity as successor-in-interest to the Department of Energy and Great Plains Gasification Associates; Appellant,

United States of America, on behalf of
The Department of Energy,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA;
ANR Pipeline Company, Michigan-Wisconsin Pipe Line Company; Transcontinental Gas Pipe Line Corporation; Tenneco Gas Pipeline Group, formerly known as Tennessee Gas Pipeline Company, Appellees.

Nos. 91-1671, 91-1677.

United States Court of Appeals, Eighth Circuit.
Submitted Nov. 11, 1991.
Decided May 4, 1992.

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HEANEY, Senior Circuit Judge.

In the early 1980s, a partnership known as Great Plains Gasification Associates built a coal gasification plant in North Dakota to manufacture synthetic natural gas. The partnership consisted of four pipeline companies, ANR Pipeline Company, Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company, and Transcontinental Gas Pipe Line Corporation (collectively "the Pipelines"), and additional investor. Each of the Pipelines signed a Gas Purchase Agreement with the partnership to purchase a pro rata share of the plant's entire output of synthetic gas at a specified price. Each Gas Purchase Agreement contained an identical arbitration clause.[1]

The partnership provided $536 million in equity contributions to finance the gasification plant, but its construction was largely financed by a $1.5 billion loan guaranteed by the Department of Energy and secured by a mortgage on the plant. To gain this guarantee, the Pipelines entered into a security agreement known as the Pipeline Affiliates Agreement with the Department of Energy. Entry into the Pipeline Affiliates Agreement was expressly recognized in that agreement as a "condition precedent" for the Secretary's issuance of the $1.5 billion guarantee supporting the partnership's financing. Among other things, the Pipeline

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[1] Article XVIII of each Gas Purchase Agreement provides:

> Any dispute between the parties arising out of this Agreement (including failure to agree on matters stated to be determined by mutual agreement) shall be tried by arbitration pursuant to the Rules of the American Arbitration Association in effect at the time of such arbitration.

Affiliates Agreement contained a forum selection clause[2] and stated that if the partnership terminated its Gas Purchase Agreements with the Pipelines, the Gas Purchase Agreements would be reinstated between the Pipelines and the Secretary of Energy, who would assume the role formerly held by the partnership.[3] The Gas Purchase and Pipeline Affiliates Agreements were both executed on January 29, 1982.

During the following years, the price of natural gas in the open market plummeted. In 1985, the partnership defaulted on the loan. The Department of Energy honored its guarantee and sought to foreclose on the mortgage and, more importantly, to enforce the Gas Purchase Agreements by reinstating their conditions with the government in the role formerly held by the

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[2] As part of the Pipeline Affiliates Agreement, each of the four pipelines agreed:

> The parties hereto consent to the jurisdiction in any United States District Court located in the District of Columbia or North Dakota, in connection with any suit to enforce the rights of the Secretary hereunder.

The Pipeline Affiliates Agreement further provided:

> The rights and obligations of the parties hereunder shall be governed by and construed and interpreted in accordance with the federal laws of the United States. . . .

[3] The relevant clause of the Pipeline Affiliates Agreement provided:

> In the event of a termination of the Gas Purchase Agreement to which such Pipeline Affiliate is a party as a result of any default by [the partnership] thereunder, such Pipeline Affiliate will . . . promptly reinstate such Gas Purchase Agreement with the Secretary or his designee . . . taking the place of [the partnership], and will continue to take or pay for gas as provided thereunder on the same terms as were in effect prior to such termination and reinstatement, without penalty, upon such notice to it that the Secretary or his designee is taking over the Project and will be performing the obligations of [the partnership] under such Gas Purchase Agreement.

partnership. When the Pipeline contested the Department of Energy's actions, the government filed suit in federal court to compel the Pipelines' compliance with the Gas Purchase Agreements. The United States District Court for the District of North Dakota granted summary judgment in favor of the Department of Energy, ruling that it legitimately assumed control of the plant and that the Pipeline Affiliates Agreement obligated the Pipelines to continue purchasing 100 percent of the synthetic gas produced by the plant. This court affirmed. *See United States v. Great Plains Gasification Assocs.*, 819 F.2d 831 (8th Cir.1987); and *United States v. Great Plains Gasification Assocs.*, 813 F.2d 193 (8th Cir.1987); *cert. denied, ANR Gasification Properties Co. v. United States,* 484 U.S. 924, 108 S.Ct. 285, 98 L.Ed.2d 245 (1987).[4]

The Department of Energy operated the gasification plant until October 1988, at which time Dakota Gasification Company purchased the assets of the plant as well as the Department of Energy's rights under the reinstated Gas Purchase Agreements. Each of the gas Purchase Agreements contain assignment clauses entitling Dakota to the rights of its predecessor-in-title, the Secretary of Energy.[5] Although the Department of Energy did not assign the Pipeline Affiliates Agreement to Dakota, by its own terms, that agreement provided: "This Pipeline Affiliates Agreement shall enure to the benefit of, and be binding upon, successors and permitted assigns." Dakota paid $75 million in cash for these rights and pledged approximately $1.6 billion in future payments to the government, which were to be paid out of the revenues generated by the plant's operation over the following eighteen years.

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[4] Only ANR appealed this court's decisions to the Supreme Court.

[5] The Gas Purchase Agreements state:
"Any entity which shall succeed by purchase . . . to the properties . . . shall be entitled to the rights and shall be subject to the obligations of its predecessor in title. . . ."

Soon after Dakota assumed control of the plant, disputes arose between the Pipelines and Dakota with respect to the Pipelines' obligations under the Gas Purchase Agreements. Dakota and the United States[6] filed suit in the United States District Court of North Dakota seeking to resolve the disputes.[7] The Pipelines objected to the jurisdiction of the federal court, contending that the disputes were subject to arbitration under the Gas Purchase Agreements. The Pipelines reasoned that if the purchase obligations of the Gas Purchase Agreements were valid and binding as Dakota argued, then the arbitration clauses in the agreement were equally valid and binding and could not be ignored. The district court found this logic "impeccable" and dismissed Dakota's action. The district court, however, characterized its decision as setting the stage for "utter chaos," since it realized that its ruling would force Dakota "into four separate arbitration proceedings, in four separate locations, with separate arbitrators, [and] could produce four disparate decisions, each of which would be unappealable and final according to the contract language." Dakota and the United States appeal. We reverse.

DISCUSSION

This case turns on conflicting provisions from two separate agreements. The question presented is whether the disputes underlying this appeal must be arbitrated or litigated.

We first note that the conflicting documents, the Gas Purchase Agreements and the Pipeline Affiliates Agreement, were simultaneously executed. Indeed, if the Pipelines had refused to sign the Pipeline Affiliates Agreement with the Secretary of Energy, their

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[6] Because of its $1.6 billion interest in the continuing profitability of the gasification plant, the United States successfully moved to intervene and join Dakota.

[7] In its complaint, Dakota sought a ruling outlining the Pipelines' purchase obligations under the Gas Purchase Agreements.

entering into the Gas Purchase Agreements with the partnership would have been an empty gesture. The government conditioned its guarantee of the gasification plant's financing on the Pipelines agreeing to the Pipeline Affiliates Agreement with the Secretary of Energy, and without the government's $1.5 billion guarantee, the project would have lost three-fourths of its funding. In a transaction where the execution of one contract depends upon the execution of other contracts—in this case, executing meaningful Gas Purchase Agreements required the Secretary's guarantee of the plant's financing, and to gain this guarantee the Secretary required the Pipelines to agree to the Pipeline Affiliates Agreement—the contracts must be interpreted collectively. *Restatement (Second) of Contracts,* § 202(2) (1981).[8]

"The courts have long recognized that a contract may consist of more than one instrument." *St. Paul Fire & Marine Ins. Co. v. Tennefos Constr. Co.,* 396 F.2d 623, 628 (8th Cir.1968). Thus, as a rule of law, the Gas Purchase Agreements and the Pipeline Affiliates Agreement "should be read together as they represent successive steps which were taken to accomplish a single purpose." *Id.* This rule of interpretation applies even though the parties executing the contracts differ, as long as "the several contracts were known to all the parties and were delivered at the same time to accomplish an agreed purpose," *id.* (quoting *Peterson v. Miller Rubber Co. of New York*, 24 F.2d 59, 62 (8th Cir. 1928)), and even though the contracts did not internally reference each other. *Id.* at 629. *See also* 4 Walter Jaeger, *Williston on Contracts* § 628, at 904 (3d ed. 1961) ("Even where a writing does not refer to another writing, if such other writing was made as part of the same transaction, the two should be interpreted together.") Indeed, hinging one contract upon the execution of another contract, as was the case here, heightens the

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[8] Although the parties do not raise any choice of law issues, we note that North Dakota adheres to the position adopted by the Restatement. *See* N.D. Cent.Code § 9-07-07 (1991).

need for joint interpretation. *See LCI Communications v. Wilson*, 700 F. Supp. 1390, 1395 (W.D.Pa.1988).[9] Given these rules of interpretation, under the facts of this case, we hold that if the Secretary or its successor-in-interest has a dispute with the Pipelines concerning the Gas Purchase Agreements, the former parties can successfully demand that the dispute be litigated in the designated federal courts. We reach this conclusion for two reasons.

First, as we have explained, the Department of Energy played an integral, and perhaps even a decisive, role in making the gasification plant a reality. Without the Secretary's guarantee of the $1.5 billion loan to the partnership, the plant most likely would not have been built. Before the Department of Energy committed the government to this guarantee, it required the Pipelines to sign the Pipeline Affiliates Agreement, which expressly stated that its execution was "a condition precedent to the issuance of the Guarantee by the Secretary," and that the parties (*i.e.*, the Pipelines and the Secretary) "consent to the jurisdiction in any United States District Court . . . in connection with any suit to enforce the rights of the Secretary hereunder."

In exchange for guaranteeing the financing which made the construction of the gasification plant possible, the Department of Energy required the Pipelines to simultaneously execute the Pipeline Affiliates Agreement with the Gas Purchase Agreements so as to secure certain rights for the government and its successors-in-interest. These rights included the prerogative to litigate disputes affecting the Secretary of Energy in federal court. We therefore conclude that under the Pipeline Affiliates Agreement, any dispute involving the Secretary of Energy's rights must be

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[9] We note that under North Dakota law, "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." N.D. Cent.Code § 9-07-12 (1991). *See also Sorenson v. Olson*, 235 N.W.2d 892, 896 (N.D. 1975) and *supra* note 8.

litigated in federal court, if the Secretary or the Pipelines so desire.

Second, Dakota bought the gasification plant and its related assets for $75 million plus a promise to pay the government approximately $1.6 billion out of the future revenues generated by the plant. The Pipeline Affiliates Agreement specifically provided that the government's benefits from the Pipeline Affiliates Agreement "shall enure to the benefit of . . . successors." Each of the Gas Purchase Agreements contained assignment clauses entitling subsequent purchasers of the plant "to the rights . . . of its predecessor in title." As we explained, under the Pipeline Affiliates Agreement, the Secretary contracted for the prerogative to litigate disputes affecting its rights (which includes the Gas Purchase Agreement obligations of the Pipelines) in designated federal courts. Both the Pipeline Affiliates Agreement and the Gas Purchase Agreements specifically provide that the government's successor-in-interest will inherit the government's rights. We therefore hold that the disputes underlying this appeal must be litigated in federal court.

The Pipelines raise numerous arguments that urge a different conclusion. Each of these arguments, however, ignore the conditions under which the Secretary of Energy agreed to guarantee the financing for the gasification plant. For instance, the Pipelines contend that they seek only to arbitrate disputes under the Gas Purchase Agreements and not under the Pipeline Affiliates Agreement, thereby rendering the forum selection clause from the Pipeline Affiliates Agreement irrelevant. The district court found this logic "impeccable." We disagree. This conclusion discounts the existence of the Pipeline Affiliates Agreement, however, and forgets that because the government conditioned its guarantee on the Pipelines first signing the Pipeline Affiliates Agreement, the Gas Purchase Agreements and the Pipeline Affiliates Agreement must be interpreted collectively, and not in isolation, particularly since the documents were simultaneously

executed. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Tennefos Constr. Co.,* 396 F.2d 623, 628 (8th Cir.1968). This rule of contract interpretation is firmly rooted law, *see* 4 Walter Jaeger, *Williston on Contracts* § 628 (3d ed.1961) and 3 Arthur Corbin, *Corbin on Contracts* § 549 (2d ed. 1960), and convinces us that under the facts of this case, the current disputes over the Gas Purchase Agreements must be litigated in federal courts.

Accordingly, we reserve the district court's decision and remand for further proceedings consistent with this opinion.

MAGILL, Circuit Judge, dissenting.

I dissent from the majority's conclusion that the forum selection clause in the Pipeline Affiliates Agreement supersedes the arbitration clause in the Gas Purchase Agreements and the Transportation Agreements.[1] The Gas Purchase Agreements require each pipeline to buy, and the partnership or its successors[2] to sell, a certain quantity of synthetic gas. These agreements contain numerous provisions governing this buyer-seller relationships, including an arbitration clause. The Transportation Agreements contain additional provisions governing the buyer-seller relationship, and also include an arbitration clause. The Pipeline Affiliates Agreement, on the other hand, relates to the Secretary of Energy's guarantee of the loan made to the partnership. This agreement contains a number of covenants, representations, and warranties made by the Pipelines to the Secretary that decrease the Secretary's risk as guarantor. One covenant is that the Pipeline will reinstate the Gas Purchase Agreements with the Secretary as seller if the partnership defaults on its loan and the

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[1] The majority fails to note that the current dispute between the Pipelines and Dakota also includes issues arising under Synthetic Gas Transportation Agreements which each of the pipelines and the partnership entered prior to foreclosure by the Secretary of Energy.

[2] Dakota is a successor to the partnership.

Secretary, as guarantor, takes over the coal gasification plant.[3] This agreement also contains a forum selection clause which reads: "The parties hereto consent to the jurisdiction in any United States District Court located in the District of Columbia or North Dakota in connection with any suit to enforce the *rights of the Secretary hereunder.*" J.A. at 45 (emphasis added).

The reference in the forum selection clause to "rights ... hereunder" arguably is ambiguous. In my opinion, the correct interpretation of this language is that the Secretary has the right to litigate in the specified federal courts those claims arising from the Pipelines' breach of any covenant, representation, or warranty contained in the Pipeline Affiliates Agreement. For example, because this agreement contains a covenant that the Pipelines will reinstate the Gas Purchase Agreements, the Secretary can bring an action in federal court to enforce this promise. Once the Gas Purchase Agreements are reinstated, however, the parties must arbitrate any dispute regarding their rights and obligations under these agreements. *See Transcontinental Gas Pipeline Corp. v. Dakota Gasification Co.*, 782 F. Supp, 336, 341-42 (S.D.Tex. 1991) (also interpreting these two agreements to require arbitration in a related matter). The majority, on the other hand, argues that because the Pipeline Affiliates Agreement is the vehicle through which the Secretary obtains rights under the Gas Purchase Agreements, the phrase "rights of the Secretary hereunder" includes its rights under the Gas Purchase Agreements. Under this interpretation, the arbitration clause in the Gas

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[3] Reinstatement of the Gas Purchase Agreements was by no means the only purpose served by the Pipeline Affiliates Agreement. The agreement contains numerous other substantive provisions including covenants that the Pipelines will use their best efforts to obtain regulatory approval and that they will not claim rights to any patents or technology resulting from their participation in the coal gasification process.

Purchase Agreements is superseded by the forum selection clause when the government becomes the seller.[4]

I believe the majority's interpretation is incorrect for a number of reasons. First, the forum selection clause refers only to the "rights of the Secretary." The clause makes no reference to the rights of the Pipelines. The Gas Purchase Agreements, however, give the Pipelines numerous rights. Thus, if this clause were applied to the Gas Purchase Agreements, courts either would have to allow the Pipelines to arbitrate their claims under these agreements or would have to read into the forum selection clause a reference to the rights of the Pipelines. The former choice creates a conflict between arbitration and litigation whenever both the Secretary and the Pipelines claim that the other has violated their rights under the Gas Purchase Agreements. The latter choice is an inappropriate judicial rewriting of the contract. Neither of these problems would exist if, as I suggest, the forum selection clause were applied only to actions claiming a breach of a covenant, representation, or warranty contained in the Pipeline Affiliates Agreement. Under this interpretation, the failure of the forum selection clause to mention the Pipelines does not create a problem because the Pipeline Affiliates Agreement does not give the Pipelines any rights.

Second, in another provision of the Pipeline Affiliates Agreement, each Pipeline represents that there is no litigation pending that threatens its ability "to perform its obligations *hereunder or* under the Gas Purchase Agreement to which it is a party." J.A. at 43 (emphasis added). This provision makes it clear that the Pipelines have certain obligations under the Pipeline Affiliates

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[4] The majority does not address the continued viability of the arbitration clause in the Transportation Agreements. I do not believe there is any way to interpret the forum selection clause in the Pipeline Affiliates Agreement as superseding these clauses. The Pipeline Affiliates Agreement was entered prior to the Transportation Agreements and makes absolutely no reference to them.

Agreement and certain obligations under the Gas Purchase Agreements. Likewise, the Secretary must have certain rights under each, and use of the term "hereunder" refers only to its rights under the Pipeline Affiliates Agreement.

Third, the clause in the Pipeline Affiliates Agreement that reinstates the Gas Purchase Agreements in no way qualifies this reinstatement. In fact, this clause provides that the Pipelines "will continue to take or pay for gas as provided [ ]under [the Gas Purchase Agreements] on the same terms as were in effect prior to such termination and reinstatement. . . ." The arbitration clause clearly was a term in effect prior to reinstatement.

Fourth, it seem highly unlikely that the Pipeline Affiliates Agreement would eliminate the arbitration clauses without even mentioning their existence. If the parties had intended such an outcome, they easily could have done so in a more straightforward manner.

This brings me to the fifth, and perhaps most compelling, reason why the majority's interpretation of these agreements is wrong—the majority has ignored the federal policy favoring arbitration. The United State Supreme Court has articulated this policy as follows:

> The Arbitration Act[, 9 U.S.C. §§ 1-208 (1988),] establishes that, as a matter of federal law, any doubts concerning th scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L.Ed.2d 765 (1983); *see also, e.g., I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396, 399 (8th Cir.1986) (recognizing this federal policy). The Pipeline Affiliates Agreement does not, by any stretch of the imagination, clearly provide that, upon reinstatement of the Gas Purchase

Agreements by the Secretary, the forum selection clause will replace the arbitration clause in these agreements.[5] As noted, it is, at most, ambiguous. Thus, the federal policy favoring arbitration mandates that this ambiguity be resolved in favor of enforcing the arbitration clauses. *See Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 406-07 (3d Cir.1987) (resolving a dispute between an arbitration clause and a forum selection clause in favor of arbitration even though the forum selection clause did not serve an independent purpose as it does in this case).

For the above reasons, I am convinced that the majority has erroneously concluded that the forum selection clause supersedes the arbitration clause contained in the Gas Purchase Agreements and Transportation Agreements. Because these agreements require arbitration, I would affirm the district court's dismissal of the current litigation. *See Dakota Gasification Co. v. ANR Pipeline Co.*, No. A1-90-227 (D.N.D. Jan. 11, 1991).

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[5] The Secretary did not even assign its rights under the Pipeline Affiliates Agreement to Dakota. Rather, it assigned only the assets of the gasification facilities and its rights under the Gas Purchase Agreements and Transportation Agreements. This indicates that, until this dispute, the Secretary also did not view the forum selection clause as governing the relationship betweem the pipelines and the seller of gas.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91-1671/1677

DAKOTA GASIFICATION COMPANY, IN ITS OWN CAPACITY AS SUCCESSOR-IN-INTEREST TO THE DEPARTMENT OF ENERGY AND GREAT PLAINS GASIFICATION ASSOCIATES,

UNITED STATES OF AMERICA, ON BEHALF OF THE DEPARTMENT OF ENERGY,

Appellant,

vs.

NATURAL GAS PIPELINE COMPANY OF AMERICA; ANR PIPELINE COMPANY, MICHIGAN-WISCONSIN PIPE LINE COMPANY; TRANSCONTINENTAL GAS PIPE LINE CORPORATION; TENNECO GAS PIPELINE GROUP; FORMERLY KNOWN AS TENNESSEE GAS PIPELINE COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

May 4, 1992

A true copy.

Attest: /s/ MICHAEL E. GAINS
Michael E. Gains
Clerk, U.S. Court of Appeals,
Eighth Circuit

"Let the within Mandate be filed and entered on the Clerk's Records."

Dated: July 27, 1992

/s/ PATRICK A. CONMY
Patrick A. Conmy, Chief Judge
United States District Court

NOTICE OF ENTRY
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 27 day of July 1992
EDWARD J. KLECKER, CLERK

By: DEBORAH THOMASEN
Deputy

Appendix B

B.

MEMORANDUM AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHWESTERN DIVISION, January 11, 1992

Appendix B

IN THE UNITED STATES DISTRICT COURT DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

DAKOTA GASIFICATION COMPANY, *et al.*,

Plaintiff,

vs.

ANR PIPELINE COMPANY, *et al.*,

Defendants.

CIVIL NO. A1-90-227

MEMORANDUM AND ORDER

Four pipeline companies, owned by or division of utilities engaged in the transportation and sale of natural gas, formed a partnership for the construction of an experimental plant for the extraction of synthetic natural gas from lignite coal. The plant and the costs of construction were both gargantuan.

The construction costs were funded through loans guaranteed by the Federal Government through the Department of Energy. The "mortgage" securing the loan covered the physical plant itself, and in addition was an assignment of the gas purchase contracts and the gas transportation contracts entered into by each company with the operating partnership.

The contracts, transportation and purchase, contained arbitration clauses providing for arbitration as the sole remedy available to the signers for resolution of disputes arising under the agreements. The "mortgage" (exhibit H to the loan guaranty agreement) provided that in the event of foreclosure, any suit between the companies and the Department of Energy "to enforce the

rights of the Secretary hereunder" would be resolved through legal proceedings in the federal district courts of either North Dakota or the District of Columbia.

The plant turned out to be almost too successful. Natural gas prices were deregulated, and instead of rising closer to the contract price of the synthetic gas, prices dropped sharply. The pipeline companies and parent utilities were now paying for synthetic gas at a high price, with abundant quantities of cheap natural gas available, and also being forced to buy a much higher production of synthetic gas than initially contemplated.

A default occurred and the "mortgage" was foreclosed, resulting in the Department of Energy taking over the plant and becoming the holder of the gas purchase and transportation contracts. Suit was held in this court, by virtue of the jurisdiction agreed to in the "mortgage" documents, involving various issues, and a determination made of the rights of various parties construing some of the language in the gas purchase and transportation agreements. The judgment entered was upheld on appeal and became final. *See United States v. Great Plains Gasification Associates,* 819 F.2d 831 (8th Cir. 1987).

The Department of Energy then sold the plant and the rights under the gas agreements to Dakota Gasification Company. The purchase price is in part a computation based on the income to Dakota Gasification from the operations of the plant and the gas purchase and transportation contract obligations of the defendants.

Disagreements have now developed between Dakota Gasification Company and the defendants over, the court assumes, pricing and quantity computations under the contracts. Apparently a portion of the dispute even involves an attempt by the defendants to avoid the sacred utterances of this court in the earlier construction of the agreements. Dakota Gasification filed suit in this court seeking a resolution of the dispute. Some of the defendants

countered with applications for arbitration according to the terms of the gas purchase and transportation contracts.

The plaintiff, seeking to bolster its position that the legal action should remain in its home town, added the Department of Energy as a party plaintiff, urging that the arbitration clause would not be applicable, and, at the same time sought a temporary restraining order to prevent one defendant from going ahead with a proceeding in a federal district court in Texas where an order compelling arbitration was being sought.

This court denied the TRO, determining that irreparable injury was not likely. The court also noted that the plant is a major employer in a small population area, the area where the court sits, and is a major consumer of locally mined lignite coal, also an industry with a major local economic impact. The discussion between the court and the parties also showed that the conduct of four arbitration proceedings, in four separate locations, with separate arbitrators, could produce four disparate decisions, each of which would be unappealable and final according to the contract language. (The possibility apparently exists of eight separate arbitration actions, four under the gas purchase agreements and four under the transportation agreements.)

The plaintiff, Dakota Gasification, would be forced into four separate appearances, quadruplicating the evidentiary presentation, and in theory at least, the previous final judgment of this court could be resubmitted to four arbitration panels whose decisions, without explanations, could be final. This would result, of course, in utter chaos.

The court suggested that the parties consider transferring the venue to the District of Columbia where no one would feel pressured by the appearance of a home field advantage. In the alternative, the court suggested one unified arbitration proceeding of common issues as an intelligent resolution mechanism. The defendants appear to have opted for utter chaos, and from a

review of the documents and authorities produced, utter chaos appears their right.

The arbitration clauses contained in the gas purchase and gas transportation agreements are identical and state in pertinent part:

> 1. Any dispute between the parties arising out of this Agreement (including failure to agree on matters stated to be determined by mutual agreement) shall be tried by arbitration pursuant to the Rules of the American Arbitration Association .... The decision of the arbitrators, which shall be arrived at by a majority vote, shall be binding upon the parties, and judgment may be rendered thereon by any court having jurisdiction thereof.

Section 4.10 of the Pipeline Affiliates Agreement (exhibit H to the loan agreement, or "mortgage") states: "The parties hereto consent to the jurisdiction in any United States District Court located in the District of Columbia or North Dakota, in connection with any suit to enforce the rights of the Secretary [of the Department of Energy] hereunder."

The complaint filed by plaintiffs affirms the validity of the gas purchase agreements, and seeks to have the court declare that the gas purchase agreements are valid and enforceable, and that the take or pay provisions are applicable to the entire output, without regard to "downstream" transportation capacity.

The defendants' position is simply that if the agreements are valid and binding, the arbitration clauses are equally valid and binding, and cannot be ignored by plaintiffs.

Despite the confusion and potential chaos which may result, the defendants' logic appears impeccable, and the presence or absence of the United States as a party is without effect as the mortgage documents are no longer applicable. In addition, the court finds the interest, if any, of the Department of Energy in the present suit will be adequately protected by Dakota Gasification's efforts to advance its own interests.

Therefore, the court hereby ORDERS:

1. That the motions for reconsideration of the court's order allowing the joinder of the United States as a party plaintiff are DENIED as moot, based upon the following orders.

2. That the defense motions for dismissal based on the contract language requiring arbitration are GRANTED.

3. That judgment of dismissal is entered, without costs to either party.

SO ORDERED.

Dated this 11th day of January, 1991.

/s/ PATRICK A. CONMY

Patrick A. Conmy, Chief Judge
United States District Court

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 11 day of January 1991.

EDWARD J. KLECKER, CLERK

By: /s/ DEBORAH THOMASEN
Deputy

UNITED STATES DISTRICT COURT

SOUTHWESTERN DIVISION
DISTRICT OF NORTH DAKOTA

DAKOTA GASIFICATION COMPANY, *et al.*,

vs.

ANR PIPELINE COMPANY, *et al.*,

CASE NO. A1-90-227

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the above-entitled action is dismissed without costs to either party.

Date January 11, 1991

EDWARD J. KLECKER
Clerk

/s/ DEBORAH THOMASEN
(BY) DEPUTY CLERK -
DEBORAH THOMASEN

NOTICE OF ENTRY
TAKE NOTICE THAT THE ORIGINAL OF THIS COPY WAS ENTERED IN THE OFFICE OF THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA ON THE 11 DAY OF JANUARY 1991.

EDWARD J. KLECKER, CLERK

BY: /s/ DEBORAH THOMASEN
DEPUTY

Appendix C

C.

MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, May 31, 1991

Appendix C

IN THE
UNITED STATES DISTRICT COURT
S.D. TEXAS
HOUSTON DIVISION

TRANSCONTINENTAL GAS PIPELINE CORPORATION *Plaintiff,* VS. DAKOTA GASIFICATION CO., *Defendant.*	CIV. A. NO. H-90-3453

MAY 31, 1991

MEMORANDUM AND OPINION

RAINEY, District Judge.

The Plaintiff, Transcontinental Gas Pipeline Corporation ("Transco"), filed a Petition to Compel Arbitration before this Court on November 10, 1990. The Defendant, Dakota Gasification Company ("Dakota"), filed a Motion to Dismiss and a Motion in Opposition to Transco's Petition to Compel Arbitration on November 28, 1990. On December 5, 1990, this Court heard oral argument on all the motions then pending before the Court. For the reasons stated in the body of this opinion, this Court finds that Transco's Motion to Compel Arbitration should be granted.

FACTUAL BACKGROUND

Following the energy crisis of the early 1970's the United States Congress enacted special legislation designed to provide funding for research and development of commercially viable

alternative fuel sources. Under that legislation, special loans and loan guarantees were made available for projects that would have otherwise not been commercially feasible. In the early 1980's four natural gas pipeline companies, Michigan Wisconsin Pipeline Company, Natural Gas Pipeline Company of America, Tennessee Gas Pipeline Company, and Transcontinental Gas Pipeline Corporation (Hereinafter collectively, "the Pipeline Companies"), in concert with a fifth investor formed a partnership to build and operate a coal gasification plant in North Dakota. This plant was designed to use lignite coal to produce "synthetic natural gas." The partnership was named Great Plains Gasification Associates ("Great Plains").

In order to fund the construction of this experimental plant, each of the Pipeline Companies entered into an individual Gas Purchase Agreement with Great Plains. In addition, each of the Pipeline Companies signed the Pipeline Affiliate's Agreement. The Pipeline Affiliate's Agreement was a guarantee contract between the Pipeline Companies and the Department of Energy. Transco signed both the Gas Purchase Agreement and the Pipeline Affiliate's Agreement on January 29, 1982. On the basis of the Gas Purchase Agreement and the Pipeline Affiliate's Agreement, Great Plains was able to secure mortgage financing, guaranteed by the Department of Energy, for the construction of the plant.

Eighteen months later on June 30, 1983, Transco entered into a Synthetic Gas Transportation Agreement with Great Plains. The Synthetic Gas Transportation Agreement provided for construction of a pipeline from the actual delivery point at the gasification plant to the interstate pipeline system.

Faced with the economic realities of the mid 1980's, Great Plains defaulted on the mortgage financing that had been guaranteed by the Department of Energy. On August 1, 1985, the Department of Energy foreclosed under the Pipeline Affiliate's Agreement and appointed a Trustee to operate the plant. The

default by Great Plains terminated the Gas Purchase Agreements. However, the Gas Purchase Agreements were reinstated by the Department of Energy under the specific contract provisions of the Pipeline Affiliate's Agreement. On October 7, 1988, Dakota purchased the plant and all of the assets held by the Department of Energy under an Asset Purchase Agreement. Disputes have now arisen under the Synthetic Gas Transportation Agreement and the Gas Purchase Agreement between Transco and Dakota.

On October 12, 1990, Dakota filed suit in the Federal District Court for the District of North Dakota. Dakota requested declaratory judgment, injunctive relief, and damages for breach of contract against all four Pipeline Companies. On November 8, 1990, Transco filed a demand for arbitration against Dakota in this Court.

DISCUSSION

The motions before this Court raise four questions which must be addressed at this time. The first question is whether this Court should exercise personal jurisdiction over Dakota. The second is whether this action should either be dismissed or transferred to the North Dakota Federal Court. The third question is whether or not this Court should compel arbitration. The fourth question is whether or not this Court should enjoin other parallel arbitration proceedings.

QUESTION NO. 1

Dakota asserts that this Court lacks the necessary prerequisites for exercising personal jurisdiction over the Defendant. Since personal jurisdiction is a threshold issue, the Court will address this matter first.

This Court's personal jurisdiction depends on the reach of the Texas Long Arm Statute. Tex. Civ. Prac. & Rem. Code Ann.

§§ 17.041-17.045 (Vernon 1986). It is well settled law in this circuit that the Texas Long Arm Statute extends to the limits of federal due process analysis. *Bullion v. Gillespie,* 895 F.2d 213, 215 (5th Cir. 1990); *W.N.S., Inc. v. Farrow,* 884 F.2d 200, 203 (5th Cir. 1989); *Bearry v. Beech Aircraft Corp.,* 818 F.2d 370, 372 (5th Cir. 1987).

Due process requires that a district court seeking to exercise personal jurisdiction over a non-resident defendant make two separate inquiries. The first inquiry is whether the non-resident defendant has purposefully established "minimum contacts" with the forum state. The second inquiry requires the district court to examine whether the "traditional notions of fair play and substantial justice" would be offended by the maintenance of a suit against the non-resident defendant in the forum state.

In this Circuit, the contacts of the non-resident with the forum state may support jurisdiction if either specific or general jursdiction is justified. *InterFirst Bank Clifton v. Fernandez,* 844 F.2d 279, 283 (5th Cir. 1988). Since the dispute between Dakota and Transco arises out of or is related to the alleged contacts by Dakota with the State of Texas, the appropriate analysis is one of specific jurisdiction. Because Transco seeks to invoke the jurisdiction of this Court, Transco bears the burden of presenting a prima facie case for personal jurisdiction. *D.J. Investments v. Metzeler Motorcycle Tire Agent Greg,* 754 F.2d 542, 545-546 (5th Cir. 1985).

Although the exact nature of the dispute between Transco and Dakota is not clearly in the record before this Court, it appears that Dakota is seeking to collect approximately $90,000,000 from the four Pipeline Companies involved in the transportation of gas from Dakota's plant. Dakota admits that during the process of negotiations over the disputed payments, prior to instituting litigation, its agents came to Texas on at least one occasion in an attempt to negotiate a settlement with Transco and possibly other pipelines as well. (See the affidavit of Mark D. Voss dated

November 28, 1990 and attached to Dakota's Motion to Dismiss).

In addition, Dakota admits that they routinely send auditors to Texas to audit Transco's records of pipeline transmissions and sales. Finally, Dakota has charged Transco with breaching its contractual obligations here in Texas by refusing to provide all of the documents Dakota believes are required by the contracts. Clearly, Dakota has purposefully established "minimum contacts" with the State of Texas for the specific purpose of the now contested business relationship.

The second prong of the due process analysis addresses the fairness and reasonableness of requiring Dakota to defend this lawsuit in the State of Texas. In *Asahi Metal Industry Co., Limited v. Superior Port of California,* 480 U.S. 102, 114-115, 107 S.Ct. 1026, 1033, 94 L. Ed.2d 92 (1987), the United States Supreme Court held that often the interest of the plaintiff and the forum state would be strong enough to justify even the serious burdens which may be placed on an out-of-state defendant by the exercise of personal jurisdiction. This Court finds that Dakota has derived substantial economic benefit from this particular contact with the State of Texas. The Court further finds that Dakota now seeks to extract additional economic benefit from the State of Texas by collecting additional sums from Transco. Obviously, the State of Texas has a significant interest in providing a forum for this type of litigation.

Finally, there are two additional reasons why the exercise of personal jurisdiction in this particular matter is appropriate. First, the very contracts that are in dispute provide that the Chief Judge of the Fifth Circuit may be required to make the selection of the final arbiter in this matter. Second, this dispute at least in part, arises from Transco's refusal to provide documents physically located here in Texas, to which Dakota believes it is entitled by the contracts.

The fact that Dakota's contacts with the State of Texas have occurred as a part of the on-going relationship created by these contracts which are now in dispute clearly makes the exercise of specific jurisdiction appropriate. Therefore, based on admissions by Dakota and the uncontroverted evidence provided by Transco, this Court finds that the exercise of personal jurisdiction over Dakota for the specific purpose of this motion to compel arbitration is proper.

QUESTION NO. 2

Dakota next argues that this Court should either dismiss the Motion to Compel arbitration or transfer the motion to the North Dakota United States District Court under the "first filed" rule in federal litigation. Although this Court found Dakota's argument unconvincing, the matter is now moot. The case which had been previously filed in the United States District Court for the District of North Dakota was dismissed on January 11, 1991.

QUESTION NO. 3

The third question presented by Dakota's defense is whether or not this Court should compel arbitration. Dakota makes a series of three significant challenges to the appropriateness of an Order to Compel Arbitration. The first challenge presented by Dakota is that the Illinois Uniform Arbitration Act, Ill.Rev.Stat.1989, Ch. 10, Par. 101 *et seq.*, should apply to the Motion to Compel Arbitration rather than the Federal Arbitration statute in Title IX U.S.C. § 1 et seq. Second, Dakota challenges the existence of an agreement to arbitrate between the parties. Third, Dakota challenges Transco's right to arbitration even if an Arbitration Agreement exists on the basis that Transco has waived its right to arbitrate by prior litigation. For the sake of simplicity the Court will address each of the three challenges as a separate section of this question.

SECTION ONE

Dakota argues that this Court should not compel arbitration because the Illinois Uniform Arbitration Act, Ill.Rev.Stat.1989, Ch. 10, Par. 101 *et seq.*, should control motions to compel arbitration based on the parties' election of Illinois law in the Applicable Law clause which is Article XV of the Synthetic Gas Transportation Agreement, and Article XVII of the Gas Purchase Agreement.

Dakota makes three independent arguments that the Illinois Uniform Arbitration Act, Illinois Revised Statute 1989, Chapter 10, Paragraph 101 *et seq.*, should preclude this Court from granting Transco's Motion to Compel Arbitration. Dakota first argues that Paragraph 102(c) of the Illinois Uniform Arbitration Act only grants jurisdiction to compel arbitration to a Court where a proceeding is already pending that involves the matter in dispute. Dakota concludes that since the only action pending over this matter was the North Dakota suit, that only the North Dakota Federal Court would have the authority to compel arbitration under the Illinois Statute. The dismissal of the action in North Dakota by the federal court there makes this argument moot.

Second, and the strongest thrust of Dakota's argument, is that the Southern District of Texas is not "an appropriate forum" for the resolution of this dispute over the arbitration issue. (See Defendant Dakota Gasification Company's memorandum in support of its Motion to Dismiss and in Opposition to Transcontinental Gas Pipeline Corporation's Petition to Compel Arbitration, Section C. Pages 18, 19 and 20.)

Though not spelled out precisely this "appropriate forum" argument has all the trappings of being an attack on this Court's subject matter jurisdiction. The Dakota brief states at Page 20 "no provision of the Illinois Uniform Arbitration Act designates the United States District Court for the Southern District of Texas as an appropriate forum." The problem with this argument

is that subject matter jurisdiction for the federal court can neither be granted nor destroyed by state law. Only the United States Congress can confer subject matter jurisdiction on federal courts.

Subject matter jurisdiction over this dispute was granted to this court by 9 U.S.C. § 4 which says in relevant part;

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition *any* United States District Court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

9 U.S.C. § 4 (1970) (Emphasis Added).

Diversity jurisdiction under Title 28 has been properly plead and subject matter jurisdiction is therefore appropriate.

Dakota's third argument is that the United States Supreme Court's decision in *Volt Information Sciences, Inc. v. The Board of Trustees of the Leland Stanford Junior University,* 489 U.S. 468, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989) is controlling over this Court's decision whether or not to compel arbitration.

In *Volt,* Stanford University argued that the parties had chosen to arbitrate under the California Arbitration Act which provided for a stay of arbitration during related litigation even though the Federal Arbitration Act would not grant such a stay. The State Court in *Volt* had ruled that the choice of law provision in the parties' agreement intended the California Rules of Arbitration to apply. The Supreme Court in affirming the State Court's grant of the stay said:

> "But we do not think the Court of Appeals offended the Moses Cone principle by interpreting the choice of law provision to mean that the parties' intended the California

> Rules of Arbitration, including the § 1281.2(c) stay provision, to apply to their Arbitration Agreement. There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to insure the enforceability, according to their terms, of private agreements to arbitrate."

The case at bar is inapposite to the *Volt* decision. First, even if the choice of law clause should be construed to mean that the Illinois Uniform Arbitration Act applies, Dakota has failed to point this Court to any provision of the Illinois Act that would preclude the granting of the Motion to Compel Arbitration. Second, it is not clear from the Agreement that the parties intended for the Illinois Uniform Arbitration Act to apply to their agreement; and here, unlike *Volt,* no Court has ruled that the parties agreement intended for the Illinois Arbitration Rules to be applied. The parties expressly provided that the arbitration would proceed pursuant to the rules of the American Arbitration Association in effect at the time of the arbitration. (See Synthetic Gas Transportation Agreement, Article XVI Arbitration, pages 15 and 16, and Gas Purchase Agreement, Article XVIII Arbitration, page 35.)

Dakota's argument misconceives the *Volt* holding. In *Volt* the Supreme Court allowed that the parties could choose the rules under which they would arbitrate and the substantive law of the state that would apply. In *Volt* a substantive right was granted by the state law that would not have been granted by the Federal Arbitration Act. Dakota has not claimed that the Illinois Act would not compel arbitration nor that the Illinois Act would grant Dakota some other substantive right that the Federal Arbitration Act would deny. But instead, they have argued that the Illinois procedural rules as to jurisdiction and appropriate forum should apply to the federal court. This simply is not the law. The federal court may apply the substantive law of a state; however, the

federal court's procedural rules, especially in matters of jurisdiction and forum selection, are always controlled by federal law.

SECTION TWO

The thrust of Dakota's real argument in opposing the Motion to Compel Arbitration is that when the Department of Energy reinstated the Gas Purchase Agreement and the Synthetic Gas Transportation Agreement, under the authority granted to the Secretary of Energy by the Pipeline Affiliate's Agreement, the arbitration clauses in the two original contracts were either modified or ceased to exist. This Court finds Dakota's argument to be without merit for the following reasons.

First, this Court agrees with the United States District Court for North Dakota's assessment of the parties' rights in the order dated January 14, 1986, signed by Judge Conmy. Judge Conmy stated "the United States has succeeded to the contract rights of the 'partnership', [Great Plains] and has also assumed the duties of the partnership under the contract. No greater or lesser duty is imposed upon the United States than created by the contract on the partnership."

Dakota argues that because the Department of Energy could not have been forced to submit to binding arbitration under the contracts Dakota cannot be forced to either. However, the fact that the United States government or the Department of Energy would have had an absolute statutory or constitutional defense to binding arbitration in no way alters the actual duties imposed by the contracts. Nothing in any of the contracts, including the Pipeline Affiliate's Agreement, claims to void any of the duties imposed on the seller, it simply substitutes the Secretary of the Department of Energy or the Secretary's Trustee for Great Plains as the seller under the contracts in question. Any constitutional or statutory defenses to binding arbitration that may have been available to the Department of Energy or the United States government are not transferrable or assignable to Dakota.

This Court finds that the United States by and through the Department of Energy assumed all of the duties and rights which Great Plains would have enjoyed under the Gas Purchase Agreement and the Synthetic Gas Transportation Agreement. Dakota as the successor in interest to the United States also assumed all of the rights and the duties that were imposed upon Great Plains under the contracts. Therefore, Dakota has a binding contractual obligation to proceed to arbitration on any matter that falls within the scope of the arbitration clauses.

SECTION THREE

In its final argument, Dakota urges this Court to find that Transco waived its right to arbitration by participating in previous litigation between the Department of Energy and the Pipeline Companies. There is no justification for the finding of such a waiver. Under the Pipeline Affiliate's Agreement, Transco was obligated to litigate any dispute between the Department of Energy and the Pipeline Companies. Transco's compliance with its contractual obligations under the Pipeline Affiliate's Agreement cannot be construed as a waiver of its rights under the Gas Purchase Agreement or the Synthetic Gas Transportation Agreement. Furthermore, the litigation of claims which could not have been arbitrated cannot be construed as a waiver of the right to arbitrate other, wholly independent claims, which can and should be arbitrated.

As a part of this argument, Dakota attempts to urge that because the Gas Purchase Agreement and the Pipeline Affiliate's Agreement were executed on the same day, they compromise one contract and should be read together. Dakota argues that the Pipeline Affiliate's Contract language alters the Gas Transportation Agreement's terms. Such a reading of the contracts is unjustified and unnecessary for the following reasons.

First, these were not simply two contracts between identical parties on the same subject. The Gas Transportation Agreement

was entered into between the Pipeline Companies and Great Plains. The second contract, the Pipeline Affiliate's Agreement, was a guarantee agreement between the Pipeline Companies and the United States government by and through the Department of Energy. That separate contract was set up to secure the mortgage financing made to Great Plains. These were separate contracts between separate parties and had separate purposes.

Second, and more importantly, the two contracts are not in conflict. The Pipeline Affiliate's Agreement only requires litigation when a dispute arises between the Pipeline Companies and the United States government as the guarantor of the mortgage. However, the Pipeline Company's Agreement with Great Plains, as evidenced by both the Gas Purchase Agreement and the Synthetic Gas Transportation Agreement, clearly intended that all private commercial disputes between non-governmental entities were to be resolved by binding arbitration rather than at the expense and delay of formal litigation.

QUESTION NO. 4

Finally, Transco has asked this Court to restrain the filing by Dakota of requests for arbitration in other jurisdictions while the arbitration in the Southern District of Texas is in progress. This Court declines to enjoin the other possible proceedings for the two reasons explained below.

First, the Court finds that there is no real danger of irreparable harm to either party and therefore, injunctive relief is not warranted. Second, this Court's jurisdiction to enforce the final arbitration award will not be defeated by requests for arbitration being filed in other locations.

CONCLUSION

Based on the discussion and explanations in the foregoing opinion, this Court finds that:

1. Dakota is subject to personal jurisdiction in the Southern District of Texas for the purpose of this action.

2. The Motion to Compel Arbitration was properly brought in the Southern District of Texas.

3. Both the Illinois Uniform Arbitration Act and the Federal Arbitration Act would compel arbitration in this matter.

4. The contracts between Great Plains and the Pipeline Companies were not modified by the Department of Energy's temporary status as seller under the Contracts.

5. Transco has not waived its right to compel arbitration by fulfilling its obligations to litigate under the Pipeline Affiliate's Agreement.

6. The contracts between Dakota and Transco require binding arbitration.

7. The matter currently in dispute falls within the scope of the arbitration clauses in question.

ORDER

It is therefore

ORDERED, ADJUDGED AND DECREED that Transco's Motion to Compel Arbitration is hereby GRANTED. It is further

ORDERED, ADJUDGED AND DECREED that Transco's Motion to Enjoin Related Arbitration is DENIED.

The Clerk will enter this Order and provide all parties with a true copy.

Signed this 30th day of May, 1991 at Houston, Texas.

/s/ JOHN D. RAINEY

John D. Rainey
United States District Judge

Appendix D

D.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, NOVEMBER 27, 1991

Appendix D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91-2759

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Plaintiff-Appellee,

v.

DAKOTA GASIFICATION COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before JOLLY, DAVIS and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the appeal is GRANTED, as no separate final judgment has been entered under Fed.R.Civ.P. 58.

Appendix E

E.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, JUNE 25, 1992

Appendix E

No. 91-1671/1677NDBI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAKOTA GASIFICATION COMPANY, ETC. UNITED STATES OF AMERICA, ETC. *Appellant,* v. NATURAL GAS PIPELINE COMPANY, *et. al.,* *Appellees.*	ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The motion to file a brief as amicus curiae is granted.

The suggestion for rehearing en banc is denied. Judge John R. Gibson and Judge Magill would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied. Judge Magill would grant the petition for rehearing.

Judge Loken took no part in the consideration or decision of this case.

June 25. 1992

Order Entered at the Direction of the Court:

Michael E. Geus
Clerk U.S. Court of Appeals, Eighth Circuit

Appendix F

F.

GAS PURCHASE AGREEMENT, JANUARY 29, 1982

GAS PURCHASE AGREEMENT

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GAS PURCHASE AGREEMENT

The Agreement, made and entered into as of the 29th day of January, 1982, by and between GREAT PLAINS GASIFICATION ASSOCIATES, a general partnership organized under the laws of North Dakota, (herein called "Seller") and TRANSCONTINENTAL GAS PIPELINE CORPORATION (herein called "Buyer").

WITNESSETH:

WHEREAS, Seller desires to demonstrate the feasibility of manufacturing synthetic gas from coal; and

WHEREAS, Buyer desires to supplement and augment its reserves with a long-term supply of gas by purchasing such gas for resale to its customers; and

WHEREAS, Seller plans to manufacture synthetic gas in a goal gasification plant to be constructed near Beulah, North Dakota;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties do covenant and agree as follows:

ARTICLE I

DEFINITIONS

1. *Affiliate:* Any person which directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with another person.

2. *Cubic Foot:* The volume of gas which occupies one cubic foot of space measured at 14.73 pounds per square inch absolute at a temperature of 60° Fahrenheit.

3. *Day:* A period of 24 consecutive hours beginning and ending at noon Central Standard Time.

4. *Delivery Point:* The point where Seller delivers the Gas for the account of the Buyer at the tailgate of the Gasification Plant.

5. *FERC:* Federal Energy Regulatory Commission or any agency or other governmental body or bodies succeeding to the powers of such Commission.

6. *Gas:* Synthetic gas made from coal.

7. *Gasification Plant:* The first phase of a coal gasification plant to be located near Beulah, North Dakota, which will be designed to manufacture 137,500 Mcf of Gas per stream Day from coal and be owned by Seller.

8. *Mcf:* 1,000 Cubic Feet of Gas.

9. *MMBtu:* One million British thermal units.

10. *Month:* The period beginning at noon on the first Day of a calendar month and ending at noon on the first day of the next succeeding calendar month, provided that if the first delivery of Gas does not occur on the first Day of a calendar month, then the period from the first delivery of Gas to noon on the first Day of the next succeeding month as defined herein shall be treated as a "month".

11. *Mortgage:* Indenture of Mortgage from Seller to a certain trustee for the benefit of holders of indebtedness, including the Secretary, incurred to finance the construction of the Gasification Plant and related facilities, unexecuted as of the date thereof.

12. *Partners:* ANR Gasification Properties Company, a Delaware corporation, MCN Coal Gasification Company, a Delaware corporation formerly known as PGC Coal Gasification Company, Tenneco SNG, Inc., a Delaware corporation, and Transco Coal Gas Company, a Delaware corporation, except any Partner that has withdrawn pursuant to the Great Plains Gasification Associates General Partnership Agreement as amended from time to time with the consent of the Secretary so long as the Mortgage is in effect.

13. Secretary: The Secretary of the United States Department of Energy, its designee or any other agency, corporation or body succeeding to the interests of the Secretary under the Mortgage.

14. *Total Heating Value:* The number of British thermal units produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of one cubic foot at a temperature of 60° Fahrenheit if saturated with water vapor and under a pressure equivalent to that of 30 inches of mercury at 32° Fahrenheit and under standard gravitational force (acceleration 980.665 Centimeters per sec. per sec.) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air, and when the water formed by combustion is condensed to the liquid state.

ARTICLE II

QUANTITY AND TERM

1. All of the terms and conditions herein shall become effective on the date hereof and shall continue twenty-five (25) years from the date Seller declares the Gasification Plant to be in service and declares the Gas transportation facilities referred to in Section 2 of Article VI hereof to be operational and shall continue in effect from year to year thereafter unless cancelled by either party by at least six (6) months' written notice after such twenty-five year period. On and after the date Seller declares the Gasification Plant to be in service and after the date such Gas transportation facilities are declared operational, the Seller shall tender 25 percent of the Gas to be produced by the Gasification Plant, and the Buyer shall purchase from the Seller, or shall pay Seller for if tendered but not taken, 25 percent of the Gas delivered or tendered by Seller to the interstate pipeline companies purchasing Gas from Seller (unless such obligation is ex-

cused by Section 2 of Article III, Article IX or Article XII hereof).

2. Prior to the date Seller declares the Gasification Plant to be in service but after the Gas transportation facilities referred to in Section 2 of Article VI hereof are operational, Seller may tender, and Buyer shall use its best efforts to take delivery and to the extent taken shall purchase, 25 percent of the Gas manufactured by the Gasification Plant.

3. At the end of each calendar quarter after January 1, 1982 Seller shall give Buyer notice of:

(a) The date on which Gas is anticipated to be first tendered pursuant to Section 2 of this Article II and the volumes of Gas which may be tendered from time to time thereafter and prior to the first deliveries of Gas pursuant to Section 1 of this Article II, and

(b) The date on which seller anticipates it will declare the Gasification Plant to be in service and the date on which it will declare the Gas transportation facilities to be operational as contemplated in Section 1 of this Article II.

ARTICLE III

QUALITY OF GAS

1. The Gas delivered to Buyer under the terms of this Agreement:

(a) Shall have a monthly average Total Heating Value of not less than nine hundred fifty (950) British thermal units per cubic foot.

(b) Shall be commercially free (at prevailing pressure and temperature) from objectionable odors, dust, or other solid or liquid matters which might interfere with its merchantability or cause injury to or interference with proper operation of the lines, regulators, meters or other appliances

through which it flows, and shall not contain an amount of moisture exceeding four (4) pounds per million cubic feet.

(c) Shall contain less than one grain of hydrogen sulphide per hundred cubic feet of Gas volume when tested in accordance with the following procedure: A strip of white filter paper previously moistened with fresh 5% lead acetate solution shall be exposed to the Gas for one and one-half (1½) minutes in a previously purged apparatus through which the test Gas is following at a rate of approximately five (5) cubic feet per hour; the Gas shall not directly impinge upon the test strip during the test. At the end of the stated time, the test paper thus exposed shall be compared with a second test strip similarly prepared but not exposed to the test Gas. If the exposed test strip is not noticeably darker than the comparison strip, the Gas under test shall be considered acceptable. If the exposed strip is definitely darker than the comparison strip the Gas shall be tested quantitatively for hydrogen sulphide by the Tutweiler or other acceptable method.

(d) Shall not contain more than twenty (20) gains of total sulphur per hundred cubic feet of Gas volume as determined by methods to be mutually agreed upon.

(e) Shall not contain more than one percent (1%) of oxygen by volume.

2. *Failure to Conform to Specifications:* If the Gas delivered under this Agreement by Seller shall fail at any time to conform to any of the quality specifications referred to in Section 1 of this Article III, Buyer will notify Seller or cause Seller to be notified of such deficiency and Seller shall take such action as may be necessary to remedy such deficiency promptly; provided, however, that Buyer shall have the right to refuse deliveries during any period in which a deficiency exists, and shall not be obligated to make payment for such deliveries refused, or to accept delivery and make or cause to be made changes necessary to bring the Gas

into conformity with such quality specifications, the cost of which shall be credited against Buyer's obligation under Article X hereof.

ARTICLE IV

MEASUREMENT

1. The unit for measurement of the Gas delivered by Seller shall be one Mcf of Gas measured according to Boyle's Law and Charles' Law for the measurement of gas under varying pressures with deviations therefrom as provided in Subsection (e) below on the measurement basis hereinafter specified.

2. The volume and Total Heating Value of Gas delivered by Seller shall be determined as follows:

(a) The unit volume, for the purpose of measurement, shall be one Cubic Foot of Gas.

(b) The Total Heating Value of the Gas per cubic foot shall be determined for any month by taking the arithmetical average of the heating value as recorded each day by a Cutler-Hammer or any equally efficient recording calorimeter or chromatagraph of Seller located at such place as may be agreed upon between the parties.

(c) The temperature of the Gas passing though the meters shall be determined for any day by the continuous use of a recording thermometer so installed that it may properly record the temperature of the Gas flowing through the meters. The arithmetical average of the temperature recorded each day during the period of the time covered by the meter chart shall be used in computing Gas volume.

(d) The specific gravity of the Gas shall be determined by the use of a recording gravitometer of approved type which shall be checked at least once each month by the use of

Edward's Balance or any other approved method mutually agreed upon.

(e) The deviation of the Gas from Boyle's Law shall be determined by tests upon the request of either party to this Agreement, but tests shall not be made more frequently than once in any thirty (30) day period. The apparatus and the method to be used in making such tests shall be in accordance with the recommendations of the National Bureau of Standards of the United States Department of Commerce or any other method or methods mutually agreed upon. When the deviation factors, based on the results of such tests, agree with those published by the American Gas Association in their bulletin entitled "Orifice Metering of Natural Gas — Gas Measurement Committee Report No. 3", or amendments and supplements thereto, for the composition and conditions at the point of measurement, with a tolerance of plus or minus two tenths of one percent (0.2%) said A.G.A. factors and/or formulae shall be used in computing the volume of Gas delivered under this Agreement. When the results of such tests do not agree with said A.G.A. deviation factors within said tolerance, then beginning on the date such tests are run, provided the results are accepted by both parties to this Agreement, computations of deliveries under this Agreement shall be based on the results of such tests retroactively to the date hereof, and deliveries shall continue to be so computed until additional tests have been made as provided herein.

3. The average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and four-tenths (14.4) pounds per square inch irrespective of actual elevation or location of the Delivery Point above sea level or variations in actual barometric pressure from time to time.

ARTICLE V

Measuring Equipment

1. *Measuring Station:* Buyer will install, maintain and operate, or will cause to have installed, maintained and operated, at or near the Delivery Point, a measuring station properly equipped with standard orifice meters having flange connections and other necessary measuring equipment by which the volume of Gas delivered hereunder shall be measured. The measurement facilities, including all primary and secondary elements shall be of mutually approved makes or types and shall be installed and operated in accordance with AGA Measurement Committee Report No. 3 and any amendments or supplements thereto, with corrections for deviations from Boyle's Law and Ideal Gas Law, and shall include the use of straightening vanes. Buyer and Seller shall have access to such measuring equipment at all reasonable hours, but the reading, calibrating and adjusting thereof and the changing of the charts shall be done only by Buyer. The chart cycle shall not exceed 24 hours.

2. *Check Measuring Equipment.* Seller may install, maintain and operate at its own expense, such check measuring equipment as it shall desire, provided that such equipment shall be so installed as not to interfere with the operation of Buyer's measuring equipment at or near the Delivery Point. Buyer shall have access to such check measuring equipment at all reasonable hours, but the reading, calibrating and adjusting thereof and the changing of charts shall be done only by Seller.

3. *Access to Equipment and Records:* Each party shall have the right to be present at the time of any installing, reading, cleaning, changing, repairing, inspecting, testing, calibrating or adjusting done in connection with the other's measuring equipment used in measuring deliveries hereunder. The records from such measuring equipment shall remain the property of their owner, but upon request, each will submit to the other its records and charts, together with calculations therefrom, for inspection

and verification, subject to return within thirty (30) days after receipt thereof.

4. *Care Required.* All installations of measuring equipment, applying to or affecting deliveries hereunder, shall be made in such manner as to permit an accurate determination of the quantity of Gas delivered and ready verification of the accurancy of measurement. Reasonable care shall be exercised by Buyer in the installation, maintenance and operation of any pressure regulating equipment which it may install so as to avoid, as far as practicable, any inaccuracy in the determination of the volume of Gas delivered hereunder.

5. *Failure of Meters*: In the event a meter is out of service, or registering inaccurately, the volume of Gas delivered hereunder shall be estimated:

(a) By using the registration of any check meter or meters if installed and accurately registering, or

(b) In the absence of (a), by correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation, or

(c) In the absence of both (a) and (b), then by estimating the quantity of delivery by deliveries during the periods under similar conditions when the meter was registering accurately.

Any estimate of volumes delivered shall be reported on the appropriate bill to the Buyer with the explanation of such estimate and supporting data as to how the estimate was prepared.

6. *Test of Meters.* The accuracy of Buyer's measuring equipment, including calorimeters or heating value determination instruments shall be verified by Buyer at least once in a thirty (30) day period in the presence of representatives of Seller. In the event either party notifies the other that it desires a special test of

any measuring equipment, the parties shall cooperate to secure prompt verification of the equipment.

7. *Correction for Errors of Meters.* If, upon test, any measuring equipment, including recording calorimeter, is found to be in error by not more than 2%, previous recordings of such equipment shall be considered accurate in computing deliveries hereunder; but such equipment shall be adjusted at once to record correctly. If, upon test, any measuring equipment shall be found to be inaccurate by an amount exceeding 2%, at a recording corresponding to the average hourly rate of flow for the period since the last preceding test, then any previous recordings of such equipment shall be corrected to zero error for any period which is known definitely or agreed upon, but in case the period is not known definitely or agreed upon, such correction shall be for a period extending over one-half of the time elapsed since the date of the last test, not exceeding a correction period of 16 days.

8. *Preservation of Records.* Each party shall preserve for a period of at least 3 years or such other longer period as may be required by public authority, all test data, charts and other similar records.

ARTICLE VI

DELIVERY

1. *Delivery Pressure.* Seller will maintain at the Delivery Point such pressures as may reasonably be required by Buyer but not in excess of 900 p.s.i.a.

2. *Delivery of Gas.* Seller will sell, and deliver for the account of Buyer, all Gas sold and purchased hereunder at the Delivery Point and will transport such Gas or cause arrangements to be made for the transportation of such Gas to an interconnection with an interstate pipeline system to be selected by mutual agreement between Buyer and Seller. Any contract with respect to such transportation shall be subject to the terms and condi-

tions, including rates and charges, of an agreement to be executed between Seller or its designee and Buyer. Seller and Buyer agree to negotiate in good faith in order to enter into such agreement in a timely manner so that no delay in delivery of Gas hereunder shall occur.

ARTICLE VII

Possession of and Responsibility For Gas

1. *Possession of Gas.* As between the parties hereto, Seller shall be deemed to own and to be in control and possession of the Gas subject to this Agreement until it shall have been delivered to Buyer at the Delivery point at which time ownership, control and possession thereof shall be in Buyer.

2. *Responsibility.* Buyer shall have no responsibility (other than the obligation to pay for Gas tendered) with respect to any Gas until it is delivered to Buyer at the Delivery Point or on account of anything done, occurring or arising with respect to said Gas before such delivery, and Seller shall have no responsibility with respect to such Gas after it is delivered to Buyer at the Delivery Point or on account of anything done, occurring or arising with respect to said Gas after such delivery to Buyer.

ARTICLE VIII

Warranty of Title To Gas

1. Seller warrants that it will at the time of delivery have good title to all Gas which it has delivered to Buyer at the Delivery Point free and clear of all liens and encumbrances. Seller will indemnify Buyer and save it harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of the adverse claim of any or all persons to said Gas or to royalties, taxes, license fees or charges thereon, in each case that the existence of such, if proven, would constitute a breach of the warranty of title herein expressed.

ARTICLE IX

FORCE MAJEURE

1. Neither Seller nor Buyer shall be liable in damages to the other for any act, omission or circumstances occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrest and restraints of rulers and peoples, civil disturbances, explosions, sabotage, breakage or accident to machinery or lines of pipe, line freezeups, failure in whole or part of coal or water supply, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, Federal, State or local laws, and any other cause, whether of the kind herein enumerated or otherwise and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or concern not a party hereto, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. A failure to settle or prevent any strike or other controversy with employees or with anyone purporting or seeking to represent employees shall not be considered to be a matter within the control of the party claiming suspension.

2. Such causes or contingencies affecting the performance of this Agreement by either party, however, shall not relieve it of liability in the event of its concurring negligence or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies relieve either party of liability unless such party shall give notice and full particulars of the same in writing or by telegraph to the other party as soon as possible after the occurrence relied on.

ARTICLE X

PRICE

1. Subject to the provisions of this Article X, the price to be paid by Buyer to Seller for all Gas delivered hereunder, or for which payment is due hereunder, shall be $6.75 per MMBtu, as adjusted in accordance with this Article X. Commencing on the first day of April 1981, and on the first day of each succeeding three month period thereafter the price applicable during the preceding three month period shall be increased or decreased (but not below $6.75 per MMBtu) by multiplying such price by a factor (set forth below) which reflects an equal weighting of the changes in (a) the PPI — All commodities and (b) the PPI — No. 2 Fuel Oil Price Index during such preceding three month period. The adjusted price shall be determined as follows:

(a) PPI — All Commodities

Index for last month of the preceding three month period = W

Index for last month of the second preceding three month period = Z

(b) PPI — No. 2 Fuel Oil Price Index

Index for last month of the preceding three month period = X

Index for last month of second preceding three month period = W

$$\text{Price} = \left[.50\left(\frac{W}{Z}\right) + .50\left(\frac{X}{Y}\right) \right] \left[\begin{array}{c}\text{Price applicable during} \\ \text{preceding three month period}\end{array} \right]$$

2. Notwithstanding any other provision of this Article X, the following limitations shall apply:

(a) During the period commencing with the initial delivery of Gas hereunder and continuing for five years thereafter, in no event shall the price payable hereunder be greater than

the No. 2 Fuel Oil Price expressed on the basis of price per MMBtu; *provided,* however, that this limitation shall not apply at any time that the No. 2 Fuel Oil Price is a Regulated Price as defined in subsection 5(d)(i) of this Article X.

(b) During the period commencing with the fifth anniversary of the initial delivery of Gas hereunder and continuing for five years thereafter, in no event shall the price payable hereunder be greater than the higher of the following:

(i) The arithmetical average of the Domestic Prices per MMBtu of natural gas paid during the preceding three-month period by each of the interstate pipeline companies purchasing Gas from Seller. For purposes of this subsection 2(b)(i) only, the Domestic Price for each such pipeline company shall be calculated as follows: (A) each pipeline company shall first determine the total volumes of natural gas purchased by it during the preceding three-month period produced from reserves in the lower 48 states of the United States, including only such purchases as were made pursuant to contracts between such pipeline company and natural gas producers which were not Affiliates of such pipeline company; (B) each pipeline company shall identify the highest priced contract or contracts under which it purchased a minimum of 10% of the total volumes found in step (A); (C) each pipeline company shall then calculate the volumetrically-weighted average of the prices paid by it (excluding take-or-pay payments or any other penalties) during the preceding three-month period under the contracts identified in step (B); the number calculated by each pipeline company in step (C) shall be the Domestic Price for such pipeline; *or*

(ii) The arithmetical average of the Import Prices per MMBtu paid during the preceding three-month period by each of the interstate pipeline companies purchasing Gas from Seller for gas imported in gaseous form produced from reserves in Mexico and Canada. For purposes of this subsection 2(b)(ii) only, the Import Price for each such pipeline company shall be the volumetrically-weighted average of the border prices paid by it (excluding take-or-pay or any other penalties) for such imported gas during the preceding three-month period at the point or points of entry into the United States.

(c) Notwithstanding the limitations set forth in subsection 2(b) above, in no event shall the price payable thereunder be greater than the No. 2 Fuel Oil Price expressed on the basis of price per MMBtu; provided, however, that this limitation shall not apply at any time that the No. 2 Fuel Oil Price is a Regulated price as defined in subsection 5(d)(i) of this Article X.

(d) Commencing with ~~the~~ tenth anniversary of the initial delivery of Gas hereunder, in no event shall the price payable hereunder be greater than the amount determined in accordance with subsection 2(b)(i) of this Article X without regard to subsection 2(c) of this Article X; *provided*, however, that if at any time any of the gas purchased under contracts identified in subsection 2(b)(i)(B) is purchased at a Regulated Price as defined in subsection 5(d)(ii) of this Article X, such gas shall be excluded in making the calculation provided for in subsection 2(b)(i)(C) and shall not be replaced by any other gas; *provided* further, that if at any time more than half of the gas purchased under contracts identified in subsection 2(b)(i)(B) is purchased at a Regulated Price as defined in subsection 5(d)(ii) of this Article X, the price payable hereunder shall not be subject to the

limitation imposed by subsection 2(b)(i), but shall not in any event be greater than the amount determined in accordance with subsection 2(b)(ii) of this Article X without regard to subsection 2(c) of this Article X.

3. The source for obtaining any reference to the PPI — All Commodities and the PPI — No. 2 Fuel Oil Price Index shall be The Bureau of Labor Statistics, Department of Labor. If the Bureau of Labor Statistics, or any other Federal agency ceases to publish the PPI — All Commodities or the PPI — No. 2 Fuel Oil Price Index, or the parties agree that they are no longer truly reflective of the changes in the value of manufactured commodities or of market conditions for No. 2 fuel oil respectively, then an alternate index from another mutually acceptable source shall be used.

4. If there shall be a delay in receiving any information required to calculate the price in accordance with the provisions contained herein such calculation shall be performed using the latest information which is available, including that which may be available in advance of the actual publication of any source referenced herein. Such calculation shall be recomputed as soon as practicable after receipt of such required information, and Buyer agrees to pay Seller for any increase between the price billed and the recomputed price, and Seller agrees to pay Buyer for any decrease between the price billed and the recomputed price, including interest thereon in either such case at a rate equal to the rate announced by Citibank, N.A., as the best rate available to business customers, such rate to change upon each announced rate change, but not in excess of the rate permitted by applicable law. Interest shall be calculated on payments due from Buyer from the twentieth day of the month following the month to which payment is applicable until the date upon which Buyer makes the recalculated payment. Interest shall be calculated on refunds due from Seller from the date Seller receives payment

from Buyer until the date of Seller's check or invoice credit reflecting the refund.

5. For purposes of this Article X, the following definitions shall apply:

(a) *PPI — All Commodities:* The index contained or to be contained in the *Producer Prices and Price Indexes* monthly publication by The Bureau of Labor Statistics, U.S. Department of Labor for all Commodities which as of October 1980 was 277.

(b) *PPI — No. 2 Fuel Oil Price Index*: The index contained or to be contained in the *Producer Prices and Price Indexes* monthly publication by The Bureau of Labor Statistics, U.S. Department of Labor for Middle Distillates (Fuel Oil No. 2 to Resellers) identified as commodity code 0573-020100 which as of October, 1980 was 699.1

(c) *No. 2 Fuel Oil Price*: The price contained or to be contained in the *Producer Prices and Price Indexes* monthly publication by The Bureau of Labor Statistics, U.S. Department of Labor for Middle Distillates (Fuel No. 2 to Resellers) identified as commodity code 0573-020100 which as of October, 1980 was $.809 per gallon or $5.8331 per MMBtu based on the conversion factor to be employed of 138,690 Btu's per gallon.

(d) *Regulated Price*:

(i) In the case of the No. 2 Fuel Oil Price, a price which is substantially limited by federal or state laws or regulations that restrict the maximum amount that may be charged for No. 2 fuel oil or crude oil (such as the price controls established by the Emergency Petroleum Allocation Act of 1973)

(ii) In the case of the natural gas used in the calculation contemplated in subsection 2(b)(i)(b) of

this Article X, a price which is substantially limited by federal or state laws or regulations that restrict the maximum amount that may be charged for natural gas at the wellhead (such as the price controls established by the Natural Gas Policy Act of 1978).

6. All price calculations under this Article X shall be computed to the nearest ten thousandths of a dollar.

ARTICLE XI

Billing and Payment

1. After deliveries of Gas have commenced under the terms of this Agreement, Seller shall, on or before the tenth (10th) day of the next succeeding Month, render to Buyer a statement showing the volume and the Total Heating Value of the Gas tendered to the Buyer at the Delivery Point during the preceding Month (or, in the case of the first such statement, such Value of the Gas tendered since the initial delivery of Gas). Such statement shall state the amount due in accordance with Article X hereof.

2. Buyer shall pay the amount specified in each statement issued in accordance with Section 1 of this Article XI within ten (10) days of receipt thereof.

3. Should Buyer fail to pay the full amount due to Seller when the same is due, interest thereon shall accrue at 125% of the rate announced by Citibank, N.A., as the best rate available to business customers, such rate to change upon each announced rate change, but not in excess of the rate permitted by applicable law, from the date such payment is due until the same is paid. If such default in payment continues for sixty (60) days after written notice sent by registered United States mail from Seller to Buyer, in addition to all other remedies, Seller may, at its election, to be exercised at any time while such default continues, and on thirty (30) days' written notice to Buyer, with the prior written consent of the Secretary so long as the Mortgage is in

effect, suspend deliveries of Gas hereunder or cancel and terminate this Agreement; provided, however, that the provisions for suspending deliveries or terminating this Agreement shall not apply if Buyer's refusal to pay any amount claimed by Seller is the result of a bona fide dispute and Buyer pays all amounts not in dispute and furnishes adequate security to Seller for payment of the amounts in dispute until the final determination of the dispute.

4. Each party shall have the right at reasonable hours to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, or computation made pursuant to the provisions of any article hereof. If any such examination reveals any inaccuracy in any billing theretofore made, the necessary adjustment in such billing or payments shall be promptly made, provided that no adjustment for any billing or payment shall be made after the lapse of two (2) years form the rendition thereof unless challenged prior thereto.

ARTICLE XII

PAYMENT OBLIGATIONS

1. It is recognized by Buyer and Seller that the terms of this Agreement provide the basis upon which the Seller is willing to construct the Gasification Plant. Seller will rely upon Buyer's commitment to purchase Gas hereunder as Seller proceeds in good faith to make the necessary commitments in order that the Gasification Plant may become operational as planned. In return, Buyer believes it will be assured a long-term supply of Gas on equitable and reasonable terms and conditions. Further, it is recognized that Buyer, in making its commitment to purchase such Gas will rely upon (1) a finding by the FERC that Buyer's execution of this Agreement is a prudent act and (2) advance assurances from the FERC that the charges hereunder may be reflected in Buyer's rates. Recognition of the foregoing by Buyer and Seller, therefore, constitutes the basis upon which Buyer is

willing to commit to the purchase of the Gas and Seller is willing to proceed with the construction of the Gasification Plant. If, however, a subsequent action by the FERC should remove from the Buyer the right to reflect any or all charges under this Agreement, it is hereby agreed as follows:

(a) Notwithstanding the provisions of Articles X and XI of this Agreement, Buyer shall be obligated to make payments to Seller in accordance with such Articles only to the extent that the FERC allows Buyer to charge the amounts described therein to its customers on a rolled-in basis pursuant to the purchased gas cost adjustment provision of Buyer's FERC Gas Tariff or on a substantially equivalent basis which provides for the charging of such amounts.

(b) If permitted to charge the amounts specified in subsection 1 (a) of this Article XII to its customers subject to a refund obligation, Buyer shall pay amounts equal to the amounts so charged by it to the extent subject to a refund obligation into an escrow account, to be established on terms satisfactory to Buyer, Seller, and to any assignee of Seller's rights in this Agreement, for refund to Buyer and/or payment to Seller or such assignee upon determination of the extent of such refund obligation.

(c) The inclusion of this Article XII in this Agreement shall not be construed as an acknowledgement by Buyer or Seller that the FERC may lawfully modify or revoke the Buyer's right to charge its customers as contemplated by this Agreement nor as a waiver by either party of its right to contest any action to modify of revoke such right. Buyer agrees to inform Seller promptly of any proceeding which may be instituted to revoke or modify such right and, thereafter, to furnish to Seller copies of each material document which Buyer shall file or receive as a party to such proceeding and such other information with respect thereto as Seller may reasonably request. Buyer agrees to avail itself

of, and pursue diligently, the administrative and judicial remedies (including appeals) reasonably available to it to contest the revocation or modification of such right until all such remedies have been exhausted. Seller shall have the right to participate in any such efforts by Buyer or, at Seller's option, to intervene in any such proceeding as a separate party.

(d) Seller shall have the right to discontinue deliveries of Gas to which Buyer is otherwise entitled hereunder, or any portion thereof, during any period during which Buyer is not making full payments to Seller of amounts due under Articles X and XI hereof as a result of the provisions of subsections 1 (a) and 1 (b) of this Article XII, unless Buyer agrees to make payments as provided in such Articles X and XI notwithstanding action by the FERC. Upon such discontinuance, Seller may dispose of or sell the Gas in its sole discretion so long as such suspension of deliveries to Buyer continues. In the event that Buyer should ultimately be unsuccessful in contesting the revocation or modification referred to in subsection 1 (c) of this Article XII, Seller shall have the right to solicit offers from others to purchase the Gas which Buyer is other entitled to purchase hereunder. Seller shall give Buyer written notice of any commitment from another party to purchase such Gas at a price and on other terms which are acceptable to Seller, and Buyer shall within fifteen (15) days after receipt of notice of such commitment agree either (1) to purchase its entitlement to Gas hereunder at the same price and on the same terms as such commitment, or (2) to release its rights to all Gas produced by the Gasification Plant.

ARTICLE XIII

REGULATIONS

1. This Agreement, and all the terms and provisions contained herein, and the respective obligations of the parties hereunder, are subject to the valid laws, orders, rules and regulations of duly constituted governmental authorities having jurisdiction; *provided*, however, that this section 1 shall not be construed to make valid the laws, rules and regulations of duly constituted governmental authorities having jurisdiction which would otherwise be invalid but for this section.

ARTICLE XIV

ASSIGNABILITY

1. Any entity which shall succeed by purchase, merger or consolidation to the properties, substantially as an entirety, of Seller or of Buyer, or succeeds to the interests of the Seller in this Agreement by exercise of remedies under the Mortgage, as the case may be, shall be entitled to the rights and shall be subject to the obligations of its predecessor in title under this Agreement from and after the date of such succession; and either party may assign or pledge this Agreement under the provisions of the Mortgage of any other mortgage, deed of trust, indenture or similar instrument which it has executed or may execute hereafter covering substantially all of its properties and/or substantially all of its pipeline properties; otherwise neither party shall assign this Agreement or any of its rights hereunder unless it first shall have obtained the consent thereto in writing of the other party. Notwithstanding the foregoing, either party may assign this Agreement or any part thereof to an Affiliate, except that the assigning party shall not be released from its obligations hereunder without the consent of the other party and the Secretary so long as the Mortgage is in effect.

ARTICLE XV

Limitation of Liability

1. The parties hereto hereby agree that any claim against the Seller which may arise hereunder shall be made only against the assets of the Seller, and that all rights to proceed against the Partners and the assets of the Partners, other than their interests in Seller, as a result of any such claim or any obligation arising therefrom, is hereby waived.

ARTICLE XVI

Notices

1. Any written communication shall be deemed to have been given on the earlier of (1) actual receipt thereof by a party, or (ii) the fifth day following the day of mailing, if the same shall be mailed by registered mail, return receipt requested, postage pre-paid, addressed to a party at the address set forth below, or at such other address and to such other person as may be designated from time to time by any party by written notice to the other parties.

(a) Seller:
Great Plains Gasification Associates
One Woodward Avenue
Detroit, Michigan 48226
Attention: President

(b) Buyer:
(Name of Buyer)
Transcontinental Gas Pipe Line Corporation
2700 South Post Oak Road
Houston, Texas 77024
Attention: President

ARTICLE XVII

Applicable Law

This Agreement shall be governed by and be interpreted in accordance with the Laws of the State of Illinois.

ARTICLE XVIII

Arbitration

1. Any dispute between the parties arising out of this Agreement (including failure to agree on matters stated to be determined by mutual agreement) shall be tried by arbitration pursuant to the Rules of the American Arbitration Association in effect at the time of such arbitration, except as may be provided herein. The request for arbitration shall be in writing, setting forth in detail the claim or claims to be arbitrated, the amount involved, if any, and the remedy sought. Within fifteen days after the delivery of the request, each party shall select one person to act as an arbitrator, and the two selected shall select a third arbitrator within ten days of such selection; if the arbitrators selected by the parties hereto are unable to agree upon the third arbitrator within such fifteen days, the third arbitrator shall be selected by the Chief Judge of the United States Court of Appeals for the Fifth Circuit. All arbitrators shall be experts in the field of knowledge wherein the controversy lies. The decision of the arbitrators, which shall be arrived at by a majority vote, shall be binding upon the parties, and judgment may be rendered thereon by any court having jurisdiction thereof. It is mutually understood that the existence of a dispute which has or may become the subject of an arbitration shall in no way excuse either Seller or Buyer from performing its obligations under this Agreement and each of the parties hereto shall continue to perform in accordance with the terms of this Agreement irrespective of the existence of any such dispute.

ARTICLE XIX

ABANDONMENT

1. Seller shall have the right, with the consent of the Secretary so long as the Mortgage is in effect, to abandon its services hereunder at any time following the determination, made by Seller in its sole good faith judgment, that it is not feasible to continue such service for technological reasons, cost overruns in excess of Seller's estimate of costs of construction of the Gasification Plant or related facilities, government action, whether by legislation, regulation, amendment of authorizations or otherwise, law suits, force majeure including all causes or contingencies described in Section 1 of Article IX hereof, or any other reason, whether similar or dissimilar to those enumerated hereinabove.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the date first above written.

GREAT PLAINS GASIFICATION ASSOCIATES

By /s/ R. E. BOULANGER

Title: Treasurer
R. E. Boulanger

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

By /s/ A. HAGER BRYANT, III

Title: VP Corporate Finance
A. Hager Bryant, III

Appendix G

G.

SYNTHETIC GAS TRANSPORTATION AGREEMENT, JUNE 30, 1983

SYNTHETIC GAS TRANSPORTATION AGREEMENT

This Agreement, made and entered into as of the 30th day of June, 1983, by and between GREAT PLAINS GASIFICATION ASSOCIATES, a general partnership organized and existing under the laws of North Dakota (herein called "Partnership"), and TRANCONTINENTAL GAS PIPE LINE CORPORATION, a Delaware corporation (herein called "Shipper").

WITNESSETH:

WHEREAS, Shipper and Partnership have entered into a Gas Purchase Agreement dated as of January 29, 1982 (the "Gas Purchase Agreement") for the purchase and sale of a portion of the Gas to be produced by the Gasification Plant; and

WHEREAS, Section 2 of Article VI of the Gas Purchase Agreement provides that Partnership will transport such Gas or cause arrangements to be made for the transportation of such Gas from the Delivery Point to an interconnection with an interstate pipeline system to be selected by mutual agreement between Shipper and Partnership; and

WHEREAS, Shipper and Partnership have mutually agreed that such Gas should be transported from the Delivery Point to an interconnection with the interstate pipeline system (the "Northern Border System") owned by Northern Border Pipeline Company ("Norther Border") at a point near the southwest corner of Mercer County, North Dakota (the "Interconnection Point"); and

WHEREAS, Partnership has agreed to construct a pipeline and appurtenant facilities extending from the Delivery Point to the Interconnection Point (the "SNG Pipeline"); and

WHEREAS, Shipper has agreed that the construction of the SNG Pipeline by Partnership and the operation of the SNG Pipeline as set forth in this Agreement will satisfy Partnership's

obligations under Section 2 of Article VI of the Gas Purchase Agreement; and

WHEREAS, Shipper and Partnership acknowledge that the SNG Pipeline will be a necessary and integral part of the Great Plains Coal Gasification Project and will be financed by Partnership in accordance with the provisions of the Loan Guarantee Agreement dated as of January 29, 1982 entered into by and among Partnership and the United States of America (the "Loan Guarantee Agreement"); and

WHEREAS, Shipper acknowledges that certain of the obligations, duties and responsibilities of Partnership under this Agreement may be carried out by Project Administrator (as defined in the Loan Guarantee Agreement), acting as agent for Partnership;

NOW THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties covenant and agree as follows:

ARTICLE I

Definition of Terms

Unless defined in this Agreement, the terms used and capitalized in this Agreement shall have the respective meanings set forth in Article I of the Gas Purchase Agreement.

ARTICLE II

Quantity and Term

1. All of the terms and conditions herein shall become effective on the date hereof, shall continue in effect twenty-five (25) years from the date Partnership declares the Gasification Plant to be in service and declares the SNG Pipeline to be operational for purposes of transporting Gas under this Agreement, and shall continue in effect from year to year thereafter unless cancelled by

either party by at least six (6) Month's written notice after such twenty-five (25) year period.

2. On and after the date Partnership declares the SNG Pipeline to be operational for purposes of transporting GAS under this Agreement, Partnership shall accept the Gas purchased by Shipper pursuant to Article II of the Gas Purchase Agreement at the Delivery Point, shall transport such Gas from the Delivery Point to the Interconnection Point through the SNG Pipeline and shall deliver such Gas at the Interconnection Point to Northern Border for the account of Shipper.

ARTICLE III

MEASUREMENTS

1. Gas transported under this Agreement shall be measured at the Delivery Point in accordance with the provisions of Article IV of the Gas Purchase Agreement.

ARTICLE IV

MEASURING EQUIPMENT

1. The provisions of Article V of the Gas Purchase Agreement shall apply to Gas transported under this Agreement.

ARTICLE V

QUALITY

1. Gas transported under this Agreement shall be in conformity with the provisions of Article III of the Gas Purchase Agreement. If Gas transported under this Agreement is not in conformity with the quality specifications set forth in any agreement entered into by Shipper with respect to the transportation of Gas through the Northern Border System, Partnership shall, if Shipper so requests, install additional facilities to ensure that such

quality specifications are satisfied; *provided, however,* that Shipper shall pay its pro rata share of the capital cost of any such facilities, such share to be equal to the percentage determined by dividing Shipper's Daily Contract Quantity by the sum of the Daily Contract Quantities of all Shippers which have requested the installation of such facilities.

ARTICLE VI

PRESSURE

1. Partnership shall cause the Gas to be delivered at the Interconnection Point at a pressure sufficient to allow the Gas to enter the Northern Border System.

ARTICLE VII

QUANTITY

1. Shipper's Daily Contract Quantity shall be 34,375 Mcf of Gas. Shipper may change such Daily Contract Quantity, *provided* that (a) Shipper gives written notice of the proposed change to Partnership and to all other individuals, corporations, partnerships, associations, joint stock companies, business trusts or other legal entities (a list of which shall be supplied by Partnership to Shipper upon Shipper's request) which have entered into synthetic gas transportation agreements with Partnership which are then in effect and (b) Shipper obtains the written consent of Partnership to such change, which such consent may be withheld by Partnership in its sole discretion.

ARTICLE VIII

CHARGES

1. During the period commencing with the date on which the transportation of Gas commences under this Agreement and ending on the date prior to the date on which the Partnership

declares the Gasification Plant to be in service, Shipper shall pay Partnership a charge of sixteen and one-half cents ($.165) per Mcf of Gas transported under this Agreement. On and after the date on which Partnerhip declares the Gasification Plant to be in service and declares the SNG Pipeline to be operational for purposes of transporting Gas under this Agreement; Shipper shall pay Partnership a monthly demand charge equal to one dollar and eighty-seven cents ($1.87) multiplied by Shipper's Daily Contract Quantity and a commodity charge of eight cents ($.08) per Mcf of Gas transported under this Agreement. If the monthly demand charge provided for in the preceding sentence becomes effective on a Day which is not the first Day of a Month, then such charge shall be computed based on the number of Days such charge is applicable in that Month to the number of Days in that Month.

2. The charges provided for in the second sentence of Section 1 of this Article VIII (a) shall be adjusted within three (3) Months of the third anniversary of the date on which the transportation of Gas commences under this Agreement to reflect actual or anticipated capital and operating costs, (b) shall be adjusted to reflect the costs of operating any facilities installed pursuant to Article V of this Agreement and (c) may be redetermined by Partnership and Shipper at any time during the term of this Agreement; *provided, however,* that any such adjustment or redetermination of such charges may not reduce the monthly demand charge below the level necessary for the Partnership to recover all of its debt service charges, operation and maintenance expenses and taxes other than income taxes.

3. In the event that no Gas is transported by Partnership under this Agreement for a period of one hundred and eighty (180) consecutive days after deliveries of Gas commence, then Shipper shall not thereafter be obligated to pay Partnership the charges set forth in Section 1 of this Article VIII until Gas deliveries under this Agreement are resumed. Following the resumption of such

Gas deliveries, Shipper shall pay Partnership the charges set forth in Section 1 of this Article VIII.

4. After transportation of Gas commences under the terms of this Agreement, Partnership shall, on or before the tenth (10th) Day of each subsequent Month, render to Shipper a statement of the amount due in accordance with this Article VIII. Shipper shall pay to Partnership the amount specified in each statement issued in accordance with this Section 4 so that payment is received and Partnership has available funds on or before the twenty-fifth (25th) Day of the Month in which the statement is rendered.

5. Should Shipper fail to pay the full amount due to Partnership when the same is due, interest thereon shall accrue at 125% of the rate announced by Citibank, N.A., as the best rate available to business customers, such rate to change upon each announced rate change, but not in excess of the rate permitted by applicable law, from the date such payment is due until the same is paid. If such default in payment continues for sixty (60) Days after written notice sent by registered United States mail from Partnership to Shipper, in addition to all other remedies, Partnership may, at its election, to be exercised at any time while such default continues, and on thirty (30) Days' written notice to Shipper, with the prior written consent of the Secretary so long as the Mortgage is in effect, suspend transportation of Gas hereunder or cancel and terminate this Agreement; *provided, however,* that the provisions for suspending transportation or terminating this Agreement shall not apply if Shipper's refusal to pay any amount claimed by Partnership is the result of a bona fide dispute between Partnership and Shipper and Shipper pays all amounts not in dispute and furnishes adequate security to Partnership for payment of the amounts in dispute until the final determination of the dispute. Should Partnership charge Shipper more than is permitted by this Agreement, interest on any such overcharges

shall accrue at 125% of the Citibank rate provided for in the first sentence of this Section 5.

6. Each party shall have the right at reasonable hours to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any article hereof. If any such examination reveals any inaccuracy in any billing theretofore made, the necessary adjustment in such billing or payments shall be promptly made; *provided, however,* that no adjustment for any billing or payment shall be made after the lapse of two (2) years from the rendition thereof unless challenged prior thereto.

ARTICLE IX

Possession of and Responsibility For Gas

1. *Possession of Gas.* As between the parties hereto, Partnership shall be deemed to be in control and possession of the Gas deliverable under this Agreement until it shall have been delivered for Shipper's account to Northern Border at the Interconnection Point.

2. *Responsibility.* Shipper shall have no responsibility (other than the obligation to pay for Gas tendered under the Gas Purchase Agreement and for the transportation of Gas under this Agreement) with respect to any Gas until it is delivered for the account of Shipper to Northern Border at the Interconnection Point or on account of anything done, occurring or arising with respect to said Gas before such delivery, and Partnership shall have no responsibility with respect to such Gas after it is delivered for the account of Shipper to Northern Border at the Interconnection Point or on account of anything done, occurring or arising with respect to said Gas after such delivery for the account of Shipper.

ARTICLE X

Warranty of Title To Gas

1. Shipper warrants that it will at the time of delivery have good title to all Gas which is delivered to Partnership at the Delivery Point, free and clear of all liens and encumbrances. Shipper will indemnify Partnership and save it harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of the adverse claim of any or all persons to said Gas or to royalties, taxes, license fees or charges thereon, in each case that the existence of such, if proven, would constitute a breach of the warranty of title herein expressed.

2. Shipper shall at all times retain title to all Gas delivered to Partnership by Shipper for transportation under this Agreement. Partnership will not suffer or permit any lien or encumbrance to be placed on or against the said Gas in respect of any claim against Partnership and will indemnify and save harmless Shipper from and against any such liens, encumbrances or claims, including Shipper's cost of disputing such liens, encumbrances or claims of defending any actions in respect thereof.

ARTICLE XI

Force Majeure

1. Neither Partnership nor Shipper shall be liable in damage to the other for any act, omission or circumstances occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washcuts, arrest and restraints of rulers and peoples, civil disturbances, explosions, sabotage, breakage or accident to machinery or lnes of pipe, line freezeups, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, Federal, State or local laws and any other cause, whether of the kind herein enumerated or otherwise and

whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or concern not a party hereto, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. A failure to settle or prevent any strike or other controversy with employees shall not be considered to be a matter within the control of the party claiming suspension.

2. Such causes or contingencies affecting the performance of this Agreement by either party, however, shall not relieve it of liability in the event of its concurring negligence or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies relieve either party of liability unless such party shall give notice and full particulars of the same in writing or by telegraph to the other party as soon as possible after the occurrence relied on.

ARTICLE XII

ASSIGNABILITY

1. Any entity which shall succeed by purchase, merger or consolidation to the properties, substantially as an entirety, of Partnership or of Shipper, or which shall succeed to the interests of the Partnership in this Agreement by exercise of remedies under the Mortgage, as the case may be, shall be entitled to the rights and shall be subject to the obligations of its predecessor in title under this Agreement from and after the date of such succession; and either party may assign or pledge this Agreement under the provisions of the Mortgage or any other mortgage, deed of trust, indenture or similar instrument which it has executed or may execute hereafter covering substantially all of its properties and/or substantially all of its pipeline properties; otherwise, neither party shall assign this Agreement or any of its rights hereunder unless it first shall have obtained the consent thereto in

writing of the other party. Notwithstanding the foregoing, either party may assign this Agreement or any part thereof to an Affiliate, except that the assigning party shall not be released from its obligations hereunder without the consent of the other party and the Secretary so long as the Mortgage is in effect.

ARTICLE XIII

Limitation of Liability

1. The parties hereto hereby agree that any claim against the Partnership which may arise hereunder shall be made only against the assets of the Partnership, and that all rights to proceed against the Partners and the assets of the Partners, other than their interests in Partnership, as a result of any such claim or obligation arising therefrom, are hereby waived.

ARTICLE XIV

Notices

1. Any written communication shall be deemed to have been given on the earlier of (i) actual receipt thereof by a party, or (ii) the fifth (5th) Day following the Day of mailing, if the same shall be mailed by registered mail, return receipt requested, postage prepaid, addressed to a party at the address set forth below, or at such other address and to such other person as may be designated from time to time by any party by written notice to the other party.

(a) Partnership:
Great Plains Gasification Associates
600 Renaissance Center
Detroit, Michigan 48243
Attention: Secretary

(b) Shipper:
Transcontinental Gas Pipe Line Corporation
2800 South Post Oak Boulevard
P.O. Box 1396
Houston, Texas 77251
Attention: Gas Accounting
(with respect to billing matters)
Transportation and Exchange
(with respect to all other matters)

ARTICLE XV

Applicable Law

This Agreement shall be governed by and be interpreted in accordance with the Laws of the State of Illinois.

ARTICLE XVI

Arbitration

1. Any dispute between the parties arising out of this Agreement (including failure to agree on matters stated to be determined by mutual agreement) shall be tried by arbitration pursuant to the Rules of the American Arbitration Association in effect at the time of such arbitration, except as may be provided herein. The request for arbitration shall be in writing, setting forth in detail the claim or claims to be arbitrated, the amount involved, if any, and the remedy sought. Within fifteen (15) Days after the delivery of the request, each party shall select one person to act as an arbitrator, and the two selected shall select a third arbitrator within ten (10) Days of such selection; if the arbitrators selected by the parties hereto are unable to agree upon the third arbitrator within such ten (10) Days, the third arbitrator shall be selected by the Chief Judge of the United States Court of Appeals for the Fifth Circuit. All arbitrators shall be experts in the field of knowledge wherein the controversy lies. The decision

of the arbitrators, which shall be arrived at by a majority vote, shall be binding upon the parties, and judgment may be rendered thereon by any court having jurisdiction thereof. It is mutually understood that the existence of a dispute which has or may become the subject of an arbitration shall in no way excuse either Partnership or Shipper from performing its obligations under this Agreement and each of the parties hereto shall continue to perform in accordance with the terms of this Agreement irrespective of the existence of any such dispute.

ARTICLE XVII

ABANDONMENT

1. Partnership shall have the right, with the consent of the Secretary so long as the Mortgage is in effect, to abandon its services hereunder at any time following the determination, made by the Partnership in its sole good faith judgment, that it is not feasible to continue such services.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the date first above written.

GREAT PLAINS GASIFICATION ASSOCIATES

By /s/ NOEL F. MERMER
Title: President

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

By /s/ JOHN J. ESSLINGER
Title: Vice President of Marketing
John J. Esslinger

Appendix H

H.

PIPELINE AFFILIATES AGREEMENT, JANUARY 29, 1982

PIPELINE AFFILIATES AGREEMENT

THIS PIPELINE AFFILIATES AGREEMENT, dated as of January 29, 1982 (the "Pipeline Affiliates Agreement"), is entered into by and among MICHIGAN WISCONSIN PIPE LINE COMPANY, a Delaware corporation, NATURAL GAS PIPELINE COMPANY OF AMERICA, a Delaware corporation, TENNESSEE GAS PIPELINE COMPANY, a Division of Tenneco, Inc., a Delaware corporation, and TRANSCONTINENTAL GAS PIPE LINE CORPORATION, a Delaware corporation (all of which are referred to herein collectively as the "Pipeline Affiliates" and individually as a Pipeline Affiliate"), and the UNITED STATES OF AMERICA, acting by and through the Secretary of Energy (the "Secretary").

RECITALS

WHEREAS, it is contemplated that the Secretary will enter into a Loan Guarantee Agreement (the "Guarantee Agreement"), to be dated the date hereof, between the Secretary and Great Plains Gasification Associates, a North Dakota partnership ("Borrower"); and

WHEREAS, the execution and delivery of this Pipeline Affiliates Agreement is a condition precedent to the issuance of the Guarantee by the Secretary under the Guarantee Agreement.

NOW THEREFORE, the parties hereto agree as follows:

ARTICLE 1

DEFINITIONS

The terms used and capitalized in this Pipeline Affiliates Agreement shall have the respective meanings set forth in Article 1 of the Guarantee Agreement.

ARTICLE 2

COVENANTS

Each Pipeline Affiliate covenants severally with respect to itself only as follows:

SECTION 2.01. *FERC Opinion and Order.* Such Pipeline Affiliate shall not take any action to amend, modify, object to or contest the FERC Opinion and Order in a manner which would have a material adverse impact on the Project. Such Pipeline Affiliate agrees that it will use its best efforts (i) to cause the actions applicable to such Pipeline Affiliate set forth in Schedule 3.18A to the Guarantee Agreement to be taken on a timely basis and (ii) to cause the authorizations and approvals applicable to such Pipeline Affiliate set forth in Schedule 3.18B of the Guarantee Agreement to be obtained on a timely basis.

SECTION 2.02. *Gas Purchase Agreements; Reinstatement.* Such Pipeline Affiliate shall perform all of its material obligations under the Gas Purchase Agreement to which it is a party and such Gas Purchase Agreement will not be amended or modified without the prior express written consent of the Secretary. In the event of a termination of the Gas Purchase Agreement to which such Pipeline Affiliate is a party as a result of any default by Borrower thereunder, such Pipeline Affiliate will, subject to obtaining any appropriate orders of FERC, which such Pipeline Affiliate agrees to use its best efforts to obtain, promptly reinstate such Gas Purchase Agreement with the Secretary or his designee (including any purchaser(s) of the Facilities upon realization of the security provided for under the Mortgage) taking the place of Borrower, and will continue to take or pay for gas as provided thereunder on the same terms as were in effect prior to such termination and reinstatement, without penalty, upon notice to it that the Secretary or his designee is taking over the Project and will be performing the obligations of Borrower under such Gas Purchase Agreement.

SECTION 2.03. *Patents and Technology*

(a) Such Pipeline Affiliate hereby agrees that, except as provided in Section 6.31(c) of the Guarantee Agreement, its rights to all patents and technology resulting from any participation by it in the Project shall be assets of Borrower subject to the Mortgage.

(b)(i) Such Pipeline Affiliate shall report to Borrower all Project Inventions made by such Pipeline Affiliate. For each Project Invention, such Pipeline Affiliate shall so report within six months after conception or first actual reduction to practice, whichever occurs first, but in any event prior to any sale, public use, or public disclosure of such invention. Such Pipeline Affiliate may withhold Proprietary Data and Licensor Proprietary Data from delivery in this report, provided such Pipeline Affiliate furnishes in lieu of any such Proprietary Data or Licensor Proprietary Data so withheld Technical Data disclosing the source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements ("Form, Fit and Function" data, e.g., specification control drawings, etc.) or a general description of such Proprietary Data or Licensor Proprietary Data where "Form, Fit and Function" data are not applicable.

(ii) Pursuant to a waiver granted by the Secretary under Section 9 of the Act and this Section 2.03, Borrower shall own all right, title and interest in any Project Invention made by such Pipeline Affiliate upon which Borrower elects to file in accordance with Section 6.31(b)(i) of the Guarantee Agreement, subject to the rights of the Secretary set forth in Section 6.31(iv) of the Guarantee Agreement and the rights of such Pipeline Affiliate set forth in Section 6.31(c) of the Guarantee Agreement.

(iii) If Borrower elects to obtain patent rights to a Project Invention made by such Pipeline Affiliate, such Pipeline

Affiliate shall provide to Borrower a duly executed written confirmatory instrument and such other papers as are deemed necessary to confirm the rights of Borrower as set forth in clause (ii) of this subsection (b).

(iv) If Borrower elects not to obtain patent rights to a Project Invention, such Pipeline Affiliate shall provide to the Secretary upon request such information as would be sufficient to permit the Secretary to file for such Project Invention; provided, however, in no event shall such Pipeline Affiliate be required to deliver to the Secretary Proprietary Data or Licensor Proprietary Data.

ARTICLE 3

Representations and Warranties

Each Pipeline Affiliate severally represents and warrants to the Secretary with respect to itself only as follows:

Section 3.01. *Organization and Authority.* Such Pipeline Affiliate is a corporation duly organized and validly existing in good standing under the laws of the state of its incorporation. All of the outstanding shares of common stock of such Pipeline Affiliate are owned beneficially and of record by its respective Parent or by a wholly-owned subsidiary of its respective Parent, except that Tennessee Gas Pipeline Company is a Division of Tenneco Inc., a Delaware corporation. Such Pipeline Affiliate has the corporate power and authority to enter into this Pipeline Affiliates Agreement and the Gas Purchase Agreement to which it is a party and to carry out its obligations hereunder and thereunder. The execution, delivery and performance of this Pipeline Affiliates Agreement and such Gas Purchase Agreement have been duly authorized by such Pipeline Affiliate's Board of Directors, no further corporate action or third-party consents, including regulatory approvals of any kind (except as disclosed in Schedule PAA-3.01 hereto), are required therefor. Each such

agreement has been duly executed and delivered by such Pipeline Affiliate and constitutes its legal, valid and binding contract enforceable against such Pipeline Affiliate in accordance with its terms, except as enforcement thereof may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and except that equitable remedies are subject to judicial discretion. No event, including any event of force majeure, has occurred or is reasonably anticipated by such Pipeline Affiliate to occur that relieves or would relieve it of its obligations to pay for gas under the Gas Purchase Agreement to which it is a party. Neither such Pipeline Affiliate, nor, to the best knowledge of such Pipeline Affiliate, any other Person, governmental authority or regulatory body has instituted or has threatened to instituted proceeding to modify or change the rate structure, price determination formula, indices, or allocation of gas provided for in the Gas Purchase Agreements or to challenge the enforceability of the provisions of the Gas Purchase Agreements.

SECTION 3.02. *No Adverse Change.* Since date of this Pipeline Affiliates Agreement, there has been no change in the business, properties, assets or financial condition of such Pipeline Affiliate which would materially adversely affect the ability of such Pipeline Affiliate to perform its obligations under this Pipeline Affiliate Agreement or the Gas Purchase Agreement to which it is a party.

SECTION 3.03. *Litigation.* Except as otherwise disclosed in Schedule PAA-3.03 hereto, there is no pending or, to the best knowledge of such Pipeline Affiliate, threatened action or proceeding to which such Pipeline Affiliate is or would become a party, before any court, governmental authority or regulatory body or arbitrator, which would have a reasonable possibility of materially and adversely affecting the ability of such Pipeline Affiliate to perform its obligations hereunder or under the Gas Purchase Agreement to which it is a party.

SECTION 3.04. *No Conflicts.* Neither the execution of this Pipeline Affiliates Agreement or the Gas Purchase Agreement to which such Pipeline Affiliate is a party nor, assuming that all of the regulatory approvals set forth in Schedule PAA-3.01 hereto are obtained, the consummation of the transactions contemplated hereby or thereby and the fulfillment of or compliance with the terms and conditions hereof or thereof, contravenes any federal, state or local law, or any judgment, decree, determination or order (except as disclosed in Schedule PAA-3.04 hereto), or conflicts with or results in a breach of the terms, conditions or provisions of the certificate or articles of incorporation, by-laws or any agreement or instrument to which such Pipeline Affiliate is now a party or contemplates becoming a party or by which it is bound, or constitutes a default under any of the foregoing.

SECTION 3.05. *Officers' Certificates.* All Officers' Certificates from time to time submitted to the Secretary pursuant to the Guarantee Agreement executed by officers of such Pipeline Affiliate are and will be true and correct in all material respects at the time submitted.

ARTICLE 4

MISCELLANEOUS

SECTION 4.01. *Headings.* The titles and headings of the Sections of this Pipeline Affiliates Agreement have been inserted for convenience of reference only, are not to be considered a part hereof, and shall in no way modify or restrict the meaning of the terms of provisions hereof.

SECTION 4.02. *Governing Law.* This Pipeline Affiliates Agreement and the rights and obligations of the parties shall be governed by and construed and interpreted in accordance with the federal laws of the United States.

SECTION 4.03. *Notices.* Except as may otherwise be expressly provided for in this Pipeline Affiliates Agreement, all

notices, requests, consents, waivers, and demands or other documents provided or permitted by this Pipeline Affiliates Agreement to be given or furnished to any of the respective parties hereto, shall be deemed to have been given or furnished if in writing (which may be in the form of a telegram) and delivered to the address set forth below or to such other address as may be hereinafter designated in writing by the respective parties hereto:

If to Michigan Wisconsin Pipe Line Company:

Michigan Wisconsin Pipe Line Company
One Woodward Avene
Detroit, Michigan 48226
Attention: Vice President — Finance

If to Natural Gas Pipeline Company of America:

Natural Gas Pipeline Company of America
122 South Michigan Avenue
Chicago, Illinois 60603
Attention: President

If to Tennessee Gas Pipeline Company:

Tennessee Gas Pipeline Company, a Division of Tenneco Inc.
Tenneco Building
1010 Milam Street
Houston, Texas 77002
Attention: President

If to Transcontinental Gas Pipe Line Corporation:

Transcontinental Gas Pipe Line Corporation
2700 South Post Oak Blvd.
Houston, Texas 77056
Attention: President

If to the Secretary: Manager
Chicago Operations Office
U.S. Department of Energy
9800 South Cass Avenue
Argonne, Illinois 60439

Notices to the Secretary shall refer to Contract No. DE-FM01-82FE55014.

SECTION 4.04. *Survival of Covenants.* The covenants contained in this Pipeline Affiliates Agreement and liability for breach of any representation or warranty contained in this Pipeline Affiliates Agreement shall remain in full force and effect until repayment in full of the Guaranteed Indebtedness. No investigation by or on behalf of the Secretary or audit by the Secretary or his representative of information furnished to the Secretary pursuant to this Pipeline Affiliates Agreement or otherwise shall impair or waive any such representation, warranty, agreement or covenant or the right of the Secretary to rely thereon.

SECTION 4.05. *Amendments.* This Pipeline Affiliates Agreement may not be amended, except in each instance pursuant to a written document executed by all parties hereto.

SECTION 4.06. *No Joint Venture with the United States; No Contribution.*

(a) No action of DOE or the Secretary in connection with the issuance of the Guarantee or the carrying out of monitoring activities with respect to the Projects shall be deemed to make the United States a joint venture in the Project, and no Pipeline Affiliate shall make any representation to the contrary to any Person.

(b) In connection with any claim or action brought against any Pipeline Affiliate by third parties arising out of or in connection with the construction and operation of the Facilities or the Mine, such Pipeline Affiliate shall not seek contribution against the United State on the basis of the United States issuing the

Guarantee or taking any other action or receiving any reports in connection therewith; provided, however, that the foregoing shall not apply if the damage or injury alleged in such claim or action results from or is substantially contributed to by any act taken at the direction of the United States over the objection of Borrower or by the willful act or negligence of the United States, its designees, agents or its contractors or their officers or employees.

SECTION 4.07. *Successors and Assigns.* This Pipeline Affiliates Agreement shall enure to the benefit of, and be binding upon, successors and permitted assigns.

SECTION 4.08. *Course of Dealing.* No course of dealing by the Secretary shall operate as a waiver of any rights in respect of this Pipeline Affiliates Agreement. No delay or omission on the part of the Secretary in exercising any right in respect of this Pipeline Affiliates Agreement shall operate as a waiver of such right or any other right hereunder. A waiver on any one occasion shall not be construed as a bar to or waiver of any right or remedy on any future occasion. No waiver or consent shall be binding unless it is in writing, specifying the relevant section or sections of this Pipeline Affiliates Agreement to which such waiver related. Except as otherwise expressly provided herein, the review of or approval by the Secretary of any agreement, document or instrument to which the Secretary is not a party, whether before or after the Closing Date, shall not be construed as an amendment or waiver of any of the terms, conditions, covenants or agreements contained in this Pipeline Affiliates Agreement.

SECTION 4.09. *Severability.* The provisions of this Pipeline Affiliates Agreement are separate and severable and if any one or more of the provisions contained in this Pipeline Affiliates Agreement should be invalid, illegal or unenforceable in any respect, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired.

SECTION 4.10. *Consent or Jurisdiction.* The parties hereto consent to the jurisdiction in any United States District Court

located in the District of Columbia or North Dakota, in connection with any suit to enforce the rights of the Secretary hereunder.

IN WITNESS WHEREOF, the parties have executed this Pipeline Affiliates Agreement as of the date first above written.

MICHIGAN WISCONSIN PIPE LINE COMPANY

By /s/ R. A. WATERS
Vice President

NATURAL GAS PIPELINE COMPANY OF AMERICA

By /s/ GEORGE L. MORROW
President

TENNESSEE GAS PIPELINE COMPANY, A Division of TENNECO INC.

By /s/ M. R. WALLER
Vice President

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

By /s/ A. HAGER BRYANT, 3RD
Vice President

THE UNITED STATES OF AMERICA DEPARTMENT OF ENERGY

By /s/ BERTON J. ROTH
Deputy Director, Procurement and Assistance Management

No. 92-516

Supreme Court, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

DAKOTA GASIFICATION COMPANY AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS TENNESSEE GAS PIPELINE COMPANY, ANR PIPELINE COMPANY, AND NATURAL GAS PIPELINE COMPANY OF AMERICA

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October 9, 1992

* Counsel of Record

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QUESTION PRESENTED

Whether, notwithstanding the strong federal policy favoring arbitration, a forum selection clause in one contract may be invoked to force litigation of severable claims that arise under entirely separate but related contracts which themselves explicitly require arbitration?

STATEMENT REQUIRED BY RULE 29.1

The parent company of Tennessee Gas Pipeline Company is Tenneco, Inc. Autopartes Walker, S.A., Bordes Gas, Inc., Kern River Gas Supply Corporation, and Kern River Service Corporation are non-wholly-owned subsidiaries of Tennessee Gas Pipeline Company.

The parent of ANR Pipeline Company is American Natural Resources Corporation. ANR Pipeline Company has no non-wholly-owned subsidaries.

The parent of Natural Gas Pipeline Company of America is MIDCON Corporation and Occidental Petroleum Corporation is the ultimate parent of MIDCON. Natural Gas Pipeline Company of America has no non-wholly-owned subsidiaries.

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IN THE

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OCTOBER TERM, 1992

No. 92-516

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Petitioner,

v.

DAKOTA GASIFICATION COMPANY AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF RESPONDENTS TENNESSEE GAS PIPELINE COMPANY, ANR PIPELINE COMPANY, AND NATURAL GAS PIPELINE COMPANY OF AMERICA

Respondents Tennessee Gas Pipeline Company ("Tennessee"), ANR Pipeline Company ("ANR"), and Natural Gas Pipeline Company of America ("Natural") support the petition for certiorari filed by Transcontinental Gas Pipe Line Corporation.

Respondents adopt the Statement of the Case provided by petitioner, and agree that the judgment of the court of appeals warrants review by this Court. In declining to enforce the parties' arbitration agreements, the decision below is contrary to the holdings of the two district courts to examine those agreements, to a decision of the United States Court of Appeals for the Third Circuit, to

the congressional policy favoring arbitration adopted in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and to the decisions of this Court applying that Act. It will produce precisely the waste and inefficiencies that Congress sought to avoid: additional burdens on an already congested federal court system, needless multiplication of litigation costs, and the frustration of privately-negotiated agreements. The significance of this recurring issue warrants a grant of certiorari—or, in light of the plain error committed by the court of appeals, summary reversal.

1. As petitioner has shown, the decision of the Eighth Circuit in this case directly conflicts with the decision of the Third Circuit in *Patten Securities Corp.* v. *Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987). The Eighth Circuit declined to enforce the arbitration clauses which the parties had negotiated in the Gas Purchase Agreements because it held that they had been silently superseded by a forum selection clause in the Pipeline Affiliates Agreement.[1] The Third Circuit reached precisely the opposite result in *Patten Securities*, holding that enforcement of an arbitration clause was required notwithstanding the presence (in that case, in the *same* agreement) of a contrary forum selection clause. *Id.* at 407.

The courts of appeals reached these different conclusions because of the different weight each gave to the federal policy favoring arbitration. The Third Circuit held that arbitration clauses enjoy "federal favor." *Id.* It therefore concluded that an arguably conflicting forum selection clause "must be scrutinized carefully, and if doubts arise as to whether [a] dispute is arbitrable or not, such doubts must be resolved in favor of arbitrability." *Id.* In contrast, as the dissent demonstrated, in the

[1] The parties dispute whether the decision also rendered unenforceable the identical arbitration clauses in the Synthetic Gas Transportation Agreements. *See* Pet. 5. That dispute, however, is not relevant to this petition.

Eighth Circuit that federal policy was completely "ignored." Appendix to Petition for Certiorari ("Pet. App.") A-12.

The Eighth Circuit's decision not only creates a conflict among the circuits; it also represents a significant departure from this Court's prior decisions. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), this Court held that the Federal Arbitration Act constitutes "a congressional declaration of a liberal federal policy favoring arbitration agreements." Therefore, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself [or otherwise]." *Id.* See also *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) ("'we rigorously enforce agreements to arbitrate'") (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985)). The result below could not have been reached had those principles been properly applied.[2]

2. The significance of the decision extends well beyond its effect on these parties. Arbitration clauses are now frequently included in a wide variety of commercial contracts. These clauses are adopted because, at the time the agreement is signed, the parties believe that arbitration will enable disputes to be resolved more quickly and at less expense than will litigation in federal court, and because they provide greater certainty in commercial relations. Once a concrete dispute arises, however, one

[2] Indeed, the Eighth Circuit's antipathy toward arbitration was such that, although it treated the case as one involving an issue of contract interpretation, it reversed outright the district court's finding that the parties to these agreements intended the arbitration clauses to control. Even if it were proper to ignore the federal policy favoring arbitration, the court of appeals should at a minimum have remanded the case for further factfinding rather than substitute in the course of appellate review its unsupported speculations regarding the parties' intent for the district court's contrary conclusion.

party frequently concludes that its chances of success will be greater in court than before an arbitration panel. If courts fail to adhere to a federal policy favoring the enforcement of arbitration clauses, then parties will always be encouraged to engage in additional rounds of litigation over the arbitrability of disputes—thus defeating the whole purpose of arbitration, exacerbating rather than relieving congestion in the federal courts, lengthening rather than shortening the dispute resolution process, and discouraging parties from agreeing to arbitration in the first place.

This is why the presumption favoring arbitration clauses was established: to provide the certainty of enforcement that enables parties to such agreements to rely upon them, and thus to effectuate the federal policies favoring alternative means of dispute resolution. In the absence of such a presumption, as this case demonstrates, an arbitration clause becomes just one more contractual provision for parties to litigate over in federal court.

3. This case further illustrates the gross inefficiencies that can result when courts refuse to enforce arbitration agreements, and the ways in which such decisions will discourage parties from agreeing to arbitration clauses when they negotiate commercial contracts in the first instance. Two federal district courts, one in North Dakota and one in Texas, held that the Federal Arbitration Act required that the disputes at issue in this proceeding be resolved by separate arbitrations pursuant to the mandatory arbitration clauses included within each of the Gas Purchase Agreements.

Notwithstanding these rulings, Dakota Gasification Company ("Dakota") asked that the four arbitrations be consolidated. The American Arbitration Association, as well as the Chief Judge of the United States Court of Appeals for the Fifth Circuit (who was designated in each contract as the individual to appoint a neutral arbitrator in the event that the party-appointed arbitrators

could not agree), concluded that each of the pipelines was entitled to a separate arbitration of its dispute with Dakota. The parties then proceeded for about a year to resolve through arbitration their outstanding disputes. As can be seen from the following descriptions, significant progress had been made in those proceedings prior to the decision by the court of appeals:

- The arbitration between Dakota and Tennessee was presided over by Judge Clarence Guittard, formerly of the federal bankruptcy court and the Texas appellate bench. Under his supervision, the parties conducted voluminous discovery, exchanging or providing access to hundreds of boxes of documents. Both parties also filed extensive summary judgment motions addressing the principal issues in the case; presented oral arguments to the arbitrators on those motions; and received rulings from the arbitrators.

- The arbitration between Dakota and ANR followed a similar course. Judge Arlin Adams, formerly Chief Judge of the United States Court of Appeals for the Third Circuit, was selected as the neutral arbitrator. Pre-hearing conference briefs, reply briefs, and statements of issues were filed in April and May of 1991. Extensive discovery was accomplished, involving the production of thousands of pages of documents by both sides, responses to numerous interrogatories, and the filing of motions to compel on disputed discovery issues. Under the panel's direction, both ANR and Dakota conducted audits of the other's books and records pursuant to the governing agreements. Each party then moved for summary judgment on several issues, and rulings were issued on August 5.

- In the arbitration between Dakota and Natural, former United States District Judge Frank J. McGarr (N.D. Ill.) was the neutral arbitrator. By the time the Eighth Circuit reversed the district court, the parties had likewise already submitted extensive briefs on summary judgment, the arbitration panel

had ruled, and the parties were beginning the process of discovery concerning the remaining issues.

The decision by the Eighth Circuit has rendered much of those efforts wasteful. The progress made in the arbitration proceedings has been largely negated, and the cases have been returned to district court to start afresh. Even if some of the progress before the arbitration panels is usable in federal court, the issues will be reviewed de novo by the court, and it will certainly amount to a substantial waste of time and resources.

This result is exactly the opposite of what Congress intended when it enacted the Federal Arbitration Act, and what the parties intended when they entered into these agreements. The expense for all parties has been multiplied several times over, and the federal courts will now be required to rehear cases that belong in, and were already being adjudicated in, arbitration proceedings. The only beneficiary is Dakota, which now has the opportunity to relitigate these issues, including the issues it already lost in summary judgment proceedings before the arbitrators, and to do so in a State in which it is the principal private employer—precisely the result the parties sought to avoid when they agreed upon arbitration.

Bouncing parties back and forth between arbitration and litigation defeats all the federal policies underlying the Federal Arbitration Act. Such a result is inevitable, however, if appellate courts feel free to reverse a district court's enforcement orders based on their own perceptions of the parties' intent, without regard to any policy or presumption favoring arbitration. Because appellate courts will generally be issuing decisions reviewing such district court orders many months, if not years, after those orders are entered, the likelihood of their disrupting ongoing arbitration proceedings, generating uncertainty regarding the validity of those proceedings, and perhaps, as here, nullifying them entirely, is particularly strong.

That is what happened in this instance, and what will continue to happen if this decision is permitted to stand.

4. Finally, because the decision below is plainly in error, and contradicts clear prior holdings of this Court favoring the enforceability of arbitration agreements, summary reversal is appropriate.[3]

The Pipeline Affiliates Agreement expressly precludes the interpretation relied on by the court of appeals. That agreement provided that the Gas Purchase Agreements were to be reinstated "on the *same terms* as were in effect prior to such termination and reinstatement." Pet. App. H-2 (emphasis added). As noted by Judge Magill in dissent, the arbitration clause "clearly was a term in effect prior to reinstatement" and therefore remained part of the Gas Purchase Agreements when those agreements were reinstated. *Id.* at A-12. In contrast, the forum selection clause of the Pipeline Affiliates Agreement, upon which the court of appeals relied in displacing the arbitration clauses of the Gas Purchase Agreements, was never part of the Gas Purchase Agreements or the Synthetic Gas Transportation Agreements. Indeed, that clause by its express terms applied only to lawsuits brought "to enforce the rights of the Secretary *hereunder*," *i.e.*, lawsuits arising out of the Pipeline Affiliates Agreement. *Id.* at H-10 (emphasis added).

Thus, the dissent's reading of the contracts was plainly correct: the Pipeline Affiliates Agreement authorized lawsuits in federal court for the enforcement of the rights granted by *it* to the Secretary of Energy, while preserving the arbitration clauses in the Gas Purchase Agreements and the Synthetic Gas Transportation Agreements for disputes arising out of those Agreements. Because this lawsuit was expressly brought under the Gas Purchase

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[3] *See* Sup. Ct. R. 16.1; *cf. Wyrick* v. *Fields*, 459 U.S. 42 (1982); *Board of Educ.* v. *McCluskey*, 458 U.S. 966 (1982); *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463 (1979); *School Dist.* v. *United States*, 433 U.S. 667 (1977); R. Stern et al., *Supreme Court Practice* § 5.12 (6th ed. 1986) (collecting cases).

Agreements and the Synthetic Gas Transportation Agreements, the arbitration clauses of those agreements must apply.

Notably, the panel cited no evidence whatever—intrinsic or extrinsic—to support its contrary conclusion that the Pipeline Affiliates Agreement was meant to modify the Gas Purchase Agreements.[4] Moreover, by eliminating the arbitration clauses from the Gas Purchase Agreements, the court of appeals undercut one of the principal findings made by the district court in 1985 when it approved the Secretary of Energy's 1985 exercise of his right under the Pipeline Affiliates Agreement to reinstate the Gas Purchase Agreements. In so ruling, the district court held that:

> The United States has succeeded to the contract rights of the "partnership," and has also assumed the duties of the partnership under the [Gas Purchase Agreement]. No greater or lesser duty is imposed upon the United States than created by the contract upon the partnership.

United States v. *Great Plains Gasification Assocs.*, Civ. No. A1-85-237 (D.N.D. Jan. 14, 1986) (Appendix to Brief of Respondents 16a), *aff'd*, 819 F.2d 831 (8th Cir. 1987).[5]

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[4] The one fact relied upon by the court of appeals—that the Gas Purchase Agreements provide that a purchaser is entitled to the rights of its predecessor—is irrelevant. The only right given Dakota's "predecessor" (the Secretary of Energy) under the forum selection clause was the right to have disputes arising out of the Pipeline Affiliates Agreement litigated in court. As Judge Magill noted, the Pipeline Affiliates Agreement was not assigned to Dakota, Pet. App. A-13 n.5, but even if it had been, it could not grant Dakota more rights than it granted the Secretary.

[5] It is interesting to note that in affirming the district court's 1985 decision, the court of appeals did not find that the Gas Purchase Agreements had been modified in any respect by the Pipeline Affiliates Agreement. Indeed, the Court accepted for purposes of analysis the district court's finding that Illinois law applied. If the terms of the Pipeline Affiliates Agreement had modified the Gas Purchase Agreements, federal law would arguably apply.

Thus, a straightforward reading of these contracts requires the enforcement of their arbitration clauses. But even if there were any doubt or ambiguity—and nothing in the contracts creates any ambiguity—it would have to be resolved, as the *Patten* court held, by reliance on the strong federal policy favoring enforcement of arbitration agreements. The clarity of the contractual language, along with that established federal policy, eliminate any argument on the merits in favor of the judgment and therefore make this an appropriate case for summary reversal.

CONCLUSION

For the foregoing reasons and those stated in the petition for certiorari, the petition should be granted. In the alternative, the decision of the court of appeals should be summarily reversed.

Respectfully submitted,

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October 9, 1992

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-85-237

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs,

vs.

GREAT PLAINS GASIFICATION ASSOCIATES, *et al.*,
Defendants,

and

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Third-Party Plaintiff,

vs.

FEDERAL FINANCING BANK,
Third-Party Defendant.

MEMORANDUM AND ORDER

[Filed Jan. 14, 1986]

Plaintiffs have moved for summary judgment on all four counts of the complaint:

1. Foreclosure

2. Declaratory action regarding validity of gas purchase contract.

3. Injunctive relief requiring payments for gas at contract rates.

4. Money Judgment for unpaid "contract" rates on gas tendered to defendant Natural.

The motions are resisted.

FACTS

GPGA, a partnership composed of: ANR Gasification Properties Co.; MCN Coal Gasification Co.; Pacific Synthetic Fuel Co.; Tenneco SNG Inc.; and Tranco Coal Gas Co., invested approximately $550,000,000.00 of its capital and $1,500,000,000.00 borrowed from the Federal Financing Bank (FFB) in the construction of a plant designed to produce "natural gas" from lignite coal deposits in North Dakota.

Four "pipeline" companies, Natural Gas Pipeline Co. of America; ANR Pipeline Co.; Tennessee Gas Pipeline Co.; and Transcontinental Gas Pipe Line Corp., entered into "take or pay" gas production contracts in various percentages of plant production which totalled 100%. These contracts obligated the pipeline companies to a payment rate substantially above market price for the gas produced, which price was to reduce in periodic increments over a 25-year period.

To secure repayment of the loan, the Partnership gave a mortgage to FFB and included as security the "subsidy" purchase prices included in the gas purchase contracts.

The Department of Energy of the United States guaranteed repayment of the loan to the FFB and entered in separate contracts with the "pipeline companies" defining the rights of the parties should the partnership default.

The security arrangements for the loan also provided for a trustee to assume possession and operation of the pledged assets in the event of default.

The "pipeline companies" were either affiliated or in common ownership with four of the five partners in the "partnership."

The financing arrangements were in substance:

1. The "partnership" limited its liability to the original investment.

2. To demonstrate a "cash flow" feasibility, the "subsidy rate" gas purchase contracts were signed, with the requirement that the "subsidy price" be spreadable and chargeable to the gas consumer customers of the pipeline companies.

3. The gas purchase contract rights were included in the security package given to the FFB and to the loan guarantor, the United States.

The plant was an experimental process. The gas produced, if any, would be produced at a price conceded to be higher than market price from other sources at time of initial production.

The impetus for construction and for the execution by the pipeline companies of the gas purchase contracts was the "crisis" in the mid-1970's created by OPEC. The project was part of a program supported by the United States to reduce dependence upon foreign supplies of fossil fuel energy.

The "assumptions" and "beliefs" behind the business judgment of the contracting parties were that the energy supplies available to the United States consumers would continue to be "squeezed" by foreign producers, that prices would continue to rise, that sources of natural gas would or might become unavailable to distribution companies and that with these assumptions, the investment by way of the subsidy price structure during the early years of the plant operation was warranted through provision of a dependable supply source at a more favorable price during the later years of the initial 25-year period.

The predictions of future conditions turned out to be inaccurate.

The plant was constructed and it worked.

When the Department of Energy (DOE) refused an additional infusion of capital, the "partnership" announced that it could not meet the principal and interest payment due and "defaulted" on the mortgage obligation.

On August 1, 1985, the "partnership" relinquished control of the plant and its assets to the trustee.

During July and August of 1985, various officials of the DOE made public statements regarding the economic viability of the plant. These statements were made in justifying the refusal to inject additional capital and also after default had occurred. The gist of these statements can be summarized as:

> "The plant cannot be economically justified in view of market realities as opposed to initial market projections; it would be wrong to spend additional tax money to operate it; if we continue its operation at all, it will be for
>
> 1. a few days
> 2. a few months
> 3. until the summer of 1986
> 4. during the period income exceeds operating "expense."

After August 1, 1985, the plant continued in operation and gas was delivered to the pipeline companies. Three of the four have at times paid less than the contract price. The fourth pipeline company, ANR, has paid the contract price.

The contract rate is currently approximately 2 1/2 times the market rate.

Under present Federal Energy Regulatory Commission (FERC) orders, the pipeline companies are authorized to spread the contract rate back to their customers.

The DOE exercised the right afforded the United States in the agreements between it and the pipeline companies to "reinstate" the gas purchase contracts and did so by notice dated August 21, 1985.

Considering the defenses raised by the defendant pipeline companies, the relevant contract provisions are:

GAS PURCHASE AGREEMENT

ARTICLE XIX
ABANDONMENT

1. Seller shall have the right, with the consent of the Secretary so long as the mortgage is in effect, to abandon its services hereunder at any time following the determination, made by the seller in its sole good faith judgment,
that it is not feasible to continue such service for technological reasons,
cost overruns in excess of estimate of costs of construction of the gasification plant or related facilities,
government action, whether by legislation, regulation, amendment of authorizations or otherwise, law suits,
force majeure including all causes or contingencies described in section 1 of article IX hereof, or any other reason, whether similar or dissimilar to those enumerated hereinabove.

ARTICLE XVII
APPLICABLE LAW

This agreement shall be governed by and be interpreted in accordance with the law of the State of Illinois.

STATEMENT OF PURPOSE

Whereas seller desires to demonstrate the feasibility of manufacturing synthetic gas from coal,

and whereas, buyer desires to supplement and augment its reserves with a long term supply of gas by purchasing such gas for resale to its customers;

PAYMENT OBLIGATIONS

In return, Buyer *believes* it will be assured a long term supply of gas on equitable and reasonable terms and conditions. Further, it is recognized that buyer, in making its commitment to purchase such gas will rely upon (1) a finding by the FERC that buyers execution of this agreement is a prudent act and (2) advance assurances from the FERC that the charges hereunder may be reflected in Buyer's rates. Recognition of the foregoing by Buyer and Seller, therefore, constitutes the basis upon which Buyer is willing to commit to the purchase of the Gas and Seller is willing to proceed with the construction of the gasification plant. If however, a subsequent action by the FERC should remove from the buyer the right to reflect any or all charges under this agreement, it is hereby agreed as follows:

(a) Notwithstanding the provisions of Articles X and XI of this agreement, Buyer shall be obligated to make payments to seller in accordance with such articles only to the extent that the FERC allows buyer to charge the amounts described therein to its customers on a rolled-in basis pursuant to the purchased gas cost adjustment provision of Buyers FERC Gas tariff or on a substantially equivalent basis which provides for the charging of such amount.

One of the pipeline companies invoked the provisions of Section 2-609 of the U.C.C., "Right to adequate Assurance of Performance." The Department of Energy, in response, indicated that it would operate the plant so long as income exceeded cost of production.

It also appears that Illinois has adopted Section 2-609 of the U.C.C.

That the United States did not comply with the procedural requirements of the foreclosure statutes of the State of North Dakota and served no statutory "notice of foreclosure" prior to suit.

That the economic impact of plant closure upon the state of North Dakota and its citizens and the economic impact of the contract rates upon the pipeline company consumers are not proper matters for consideration by the court; rather, these matters may be appropriate for political or legislative action but not as a basis for contract construction.

That the motives of ANR in supporting contract validity are equally irrelevant.

The motion and objections relating to the foreclosure raise issues which must be separated into two categories. The first category creates a condition precedent to either the United States or the trustee having standing to prosecute the action.

Both GPGA and Pacific argue that plaintiff has not followed the steps set forth in the mortgage for substitution of a trustee, and that Berton J. Roth, the purported substitute trustee, is thus not lawfully in possession of the property, and by inference, lacks standing to appear as a plaintiff.

The filings show the following:

Exhibit "B" to document #177 (Roth Declaration)

a) Letter to Citibank, copied to Federal Financing Bank and GPGA, stating that the Secretary appointed Roth successor trustee under section 8.06 of the mortgage

b) Roth's acceptance of that appointment

(c) Memo to Roth notifying him that DOE was appointed as successor trustee

(d) DOE's acceptance of that appointment, and

(e) A delegation of DOE's authority as successor trustee to Roth

The letter, (a) above, was sent to GPGA by First Class Mail and GPGA does not specifically deny its receipt. (*see* McKinney declaration, attachment to document #97)

GPGA argues (document #95 at page 4) as does Pacific (document #97) that notice was not received from Citibank that it had resigned or been removed as trustee.

Section 8.06 of the mortgage provides that the Secretary is to provide notice of removal to the trustee and to GPGA.

The record reveals that the required notice was given, and by the appropriate entity.

GPGA also argues that a supplemental indenture has not been executed in accordance with 9.02 (b) (2) of the mortgage, and that such is required to authorize a successor trustee to act. The section is permissive—it states that GPGA may execute a supplemental indenture to evidence a succession in trusteeship. Nowhere does a requirement exist that such an act be done.

GPGA finally argues that under 10 C.F.R. § 796.60(f) "The guarantee agreement shall provide that, upon payment of the guaranteed loan by the Secretary, the holder shall transfer and assign to the Secretary, all rights held by the holder in the guaranteed loan . . . Upon such payment and assignment, the Secretary shall be subrogated to the rights of the recipient of the payment and shall have the superior rights in and to the property acquired from the recipient of the payment."

Evidence is required that payment and transfer of rights of the FFB have occurred.

In response thereto, Plaintiff contends that Roth exhibit VI provides sufficient uncontroverted evidence of the subrogation status of the Secretary. The court agrees and finds no genuine issue of material fact present.

Roth is the duly acting trustee and in lawful possession of the plant.

Turning next to the issues raised on the foreclosure count itself, there is a conflict in authorities regarding the applicability of state law and procedures in effecting the remedy of foreclosure.

Both Plaintiff and GPGA cite *U.S. v. Kimbell Foods*, 440 U.S. 715, 99 S.Ct. 1448 (1979) in support of their positions. *Kimbell Foods* addressed whether lien priority is to be determined under state or federal law when liens are held both by the Small Business Administration (SBA) or the Farmers Home Administration (FmHA) and by private parties. The Court first determined that federal law governs questions involving the rights of the United States arising under nationwide federal programs. Absent a congressional directive, whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy "dependent upon a variety of considerations always relevant to the nature of the specific governmental interest and to the effects upon them of applying state law." *Id.*, 440 U.S. at 728, 99 S.Ct. at 1458. Those considerations include whether the nature of a federal program necessitates a nationally uniform body of law, whether application of state law would frustrate specific objectives of the federal program, and the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

Plaintiff first argues that the balancing test outline in *Kimbell Foods* need not be applied because the statute under which the loan guarantee was made, 42 U.S.C.

¶ 5919 (g) (2), precludes application of state law. That statute provides:

> If the Secretary makes a payment under paragraph (a) of this subsection [providing for payment by the Secretary should a borrower default], the Secretary shall be subrogated to the rights of the recipient of such payment (and such subrogation shall be expressly set forth in the guarantee or related agreements), including the authority to complete maintain, operate, lease, *or otherwise dispose of any property acquired pursuant to such guarantee* or related agreements, or any other property of the borrower (of a value equal to the amount of such payment) to the extent that the guarantee applies to amounts in excess of the estimated project cost under subsection (c) (2) (B) of this section, *without regard to* the provisions of the Federal Property and Administrative Services Act of 1949, as amended [40 U.S.C.A. ¶ 471 *et seq.*] . . . or *any other law*, or to permit the borrower, pursuant to an agreement with the Secretary, to continue to pursue the purposes of the demonstration facility if the Secretary determines that this is in the public interest. The rights of the Secretary with respect to any property acquired pursuant to such guarantee or related agreements, shall be superior to the rights of any other person with respect to such property.
>
> [Emphasis added].

Plaintiff argues that this statute makes state law inapplicable to a foreclosure action, since it states the Secretary may act without regard to "any other law." GPGA argues that the statute is more logically construed as simply defining the Secretary's authority to manage secured property upon the borrower's default, rather than as defining the rights of the parties to the mortgage *vis a vis* each other. The court has found no case law construing this provision. The court finds GPGA's interpretation

to be more logical than the government's. The statute refers specifically to property management laws; to infer from the statute that it is intended to preclude application of state foreclosure laws requires that the language "without regard to . . . any other law" be very broadly interpreted.

If section 5919 (g) (2) does not specifically preclude application of state foreclosure law, the *Kimbell Foods* factors must be considered. Though the court has found no cases applying the *Kimbell Foods* factors to this particular federal loan guarantee program, there are a number of cases applying those factors to other federal loan guarantee programs. Those cases do not reach consistent results. The primary case upon which Plaintiff relies, *U.S. v. Victory Highway Village, Inc.*, 662 F.2d 488 (8th Cir. 1981), decides a question of remedies available upon default of a federally held or insured loan without mentioning *Kimbell Foods*.

In *Victory Highway Village*, the Eighth Circuit held that Minnesota's redemption statute did not apply to foreclosure of federally held or insured loans under the National Housing Act. The court reasoned that the right to redemption after foreclosure is purely statutory, and that since there is no federal statute granting a right to redemption, that right could not exist. In an earlier opinion, *Victory Highway Village, Inc. v. Weaver*, 634 F.2d 1099, 1101 (8th Cir. 1980), the court discussed *Kimbell Foods*, but found it unnecessary to decide whether federal law or state law governed interpretation of a guarantee under an SBA loan. Another Eighth Circuit case, *U.S. v. Kukowski*, 735 F.2d 1057 (8th Cir. 1984), considered *Kimbell Foods* and held that rights of a guarantor on an SBA loan were to be determined with reference to the Uniform Commercial Code, since when state law is based on a uniform statute, there is little concern that the federal interest in uniformity of law will be hindered by application of state law. In *U.S. v. Missouri*

Farmers Ass'n, Inc., 764 F.2d 488 (8th Cir. 1985), the court determined that FmHA regulations rather than state law governed release of FmHA liens since state law would conflict with the federal interest present in the FmHA loan program. In a case decided before *Kimbell Foods, U.S. v. Thompson*, 438 F.2d 254 (8th Cir. 1971), the court held that state law determined priority rights involving a federally insured loan, while federal law determined remedies available to the federal government to enforce its security interest.

Cases from other circuits supporting Plaintiff's position include the following. In *U.S. v. Scholnick*, 606 F.2d 160 (6th Cir. 1979), federal law was applied to determine priority in an action to foreclose a mortgage held by H.U.D. In *U.S. v. Med O Farm, Inc.*, 701 F.2d 88 (9th Cir. 1983), a state law barring enforcement of a "due on sale" clause was held not to apply to a loan made by FmHA. In *U.S. v. Stadium Apartments*, 425 F.2d 358 (9th Cir. 1970), state redemption statutes were held not to apply to a mortgage guaranteed by the Federal Housing Authority.

Cases from other circuits supporting GPGA's position include the following. In *U.S. v. Irby*, 618 F.2d 352 (5th Cir. 1980), the court held that state real property law governed an action to recover a deficiency judgment against guarantors under an SBA loan. In *U.S. v. Dismuke*, 616 F.2d 755 (5th Cir. 1980), the government was required to follow state law procedures for judicial confirmation of a foreclosure sale prior to obtaining a deficiency judgment against guarantors on an SBA loan. In *Chicago Title Insurance Co. v. Sherred Village Associates*, 708 F.2d 804 (1st Cir. 1983), the court held that state law governed a question of relative priority of a mechanic's lien and a mortgage insured by H.U.D.

Eighth Circuit precedent would support a ruling that Plaintiff is not required to comply with North Dakota foreclosure law. However, there is no precedent involv-

ing this particular loan guarantee program, and the court feels a determination under the *Kimbell Foods* test presents a close question. Since the number of loans guaranteed under this program is apparently small, there is little need for a "nationally uniform body of law." Application of state law might be considered to "frustrate specific objectives of federal programs," if those objectives are considered to include federal operation of the project upon default. Finally, though there may be a strong state interest in "insuring that commercial relationships predicated upon state law are not disrupted," this project is unique and this foreclosure may bear little resemblance to foreclosures of other real property.

If state law were found to apply under the balancing test of *Kimbell Foods*, there is a question of whether GPGA waived its rights under state law by virtue of section 13.03 of the mortgage agreement, which provides:

> To the full extent it may legally do so, Borrower [GPGA] hereby expressly waives any and all rights of redemption from sale under order or decree of foreclosure of this Mortgage, on behalf of Borrower as well as on behalf of each and every person acquiring any interest in or title to Mortgaged Property, by, through, or under Borrower, either subsequent to the date hereof, or prior to the date hereof and, Borrower, for itself, and for all that Borrower may legally bind, agrees that when such a sale is held under any decree of foreclosure of this Mortgage, upon consummation of said sale, the sheriff of the county where the real estate which is part of the Mortgaged Property is situated, or other officer who made such sale, or his successor in office, is hereby authorized immediately to execute and deliver to the purchaser at such sale a deed describing and conveying the premises purchased, showing the amount paid therefor, or if purchased by the person in whose favor the order or decree is entered, the amount bid therefor.

Section 13.04 of the Mortgage provides:

> This Mortgage and the rights and obligations hereunder shall be governed by and construed and interpreted in accordance with the federal laws of the United States.

GPGA, citing two early North Dakota cases, *Smith v. Grilk*, 250 N.W. 787 (N.D. 1933), and *Fargo Building & Loan Ass'n v. Rice*, 262 N.W. 345 (N.D. 1935), argues that the right of redemption is sacrosanct under state law, and that the mortgage provision thus is not an effective waiver of the right of redemption. *Fargo Building & Loan Ass'n* held that a mortgagee could lawfully possess the mortgaged property under terms of the mortgage agreement even though the mortgagor may have had a right to the rents and profits from the property. *Smith v. Grilk* was decided shortly after enactment of a redemption statute, and held that the statute was so inconsistent with waiver of the right to redemption that it repealed recognition of the right to contract for waiver of the right of redemption. The instant case is different from the cases cited: GPGA can hardly have been unaware of the waiver provision when the mortgage was executed, and the terms of this mortgage were *negotiated* among the parties. The court has little sympathy for the waiver argument, given the clear language of the mortgage. Moreover, if federal law governs foreclosure of the mortgage, state law which does not recognize waiver of the right of redemption need not be considered.

Several options are presented to the court. All have merit. These options are:

1. Follow the Eighth Circuit precedents and hold that federal law defines the remedy;

2. Analyze the factual situation under the test set out in *Kimbell Foods*, and hold that under that test state law need not be applied;

3. Hold state law applicable under *Kimbell Foods*, but find that the waiver contained in the mortgage contract is effective and not violative of public policy as the situation is not analogous to a homestead mortgage.

4. Hold that state law is applicable and that statutory notice and right of redemption apply.

The obvious fact that, as a practical matter, a statutory notice and extension of a right of redemption would likely serve no purpose cannot be the basis of decision.

Based upon the contractual provision in the mortgage agreement, particularly 13.03 and 13.04, the unique character of the property and program involved, the court finds that the holding in *U.S. v. Victory Highway Village, Inc.*, and, in addition, the application of the test measurements in *Kimbell Foods* compel a finding that state law is not applicable and that Plaintiffs are entitled to summary judgment for foreclosure.

Turning next to the motion on the second cause of action, the declaratory proceeding, the court finds and concludes that there are no issues of material fact and that the motion for summary judgment is properly before the court.

No dispute exists that the contracts were executed, the plant built, FERC approval obtained, gas produced and tendered, the mortgage obligation defaulted on by the partnership, possession and control of the plant delivered to the trustee, the guarantee obligation of the United States triggered by the default and notice given by the United States of its "reinstatement" of the gas purchase agreement.

It is not disputed that various representatives of the DOE made statements concerning the possible closure of the plant.

No one disputes that an unbridgeable chasm exists between the economic projections of the contracting par-

ties and the economic realities of 1985, in that supplies appear to have increased and prices declined rather than the opposite.

The defendants Natural Gas Pipeline Co., Tennessee Gas, and Transcontinental Gas in various combinations raise as defenses to the contract the following:

1. That the conduct of the United States precludes the enforcement of the gas purchase agreements, as such conduct creates:

   a) a basis for repudiation under the provisions of U.C.C. 2-609;

   b) a failure of consideration as the government will not "commit" to a 25-year term;

   c) a "frustration of purpose" as the government indicates an intent to not perform for a period of 25 years, and FERC action has weakened the position of the pipeline companies.

2. That the contract was entered into under "mutual mistake" of the contracting parties as to economic conditions.

3. Waiver and Estoppel.

4. The output of production is excessive because higer than anticipated.

The court finds the defenses raised to be without merit.

The United States has succeeded to the contract rights of the "partnership," and has also assumed the duties of the partnership under the contract. No greater or lesser duty is imposed upon the United States than created by the contract upon the partnership.

The court finds the contract, while unusual, to be clear and unambiguous. If gas is produced by the plant, the pipeline companies must pay for all gas produced, with-

out limitation as to quantity, so long as the gas meets the contract specifications and so long as FERC allows the cost to be spread to the customers of the pipeline companies.

The seller of the gas, under the provisions of Article XIX occupies a somewhat unusual position. It is to this position that the United States has moved. The clear language provides that the seller has the right to cease production *for any reason*, based upon its sole good faith judgment. At the time the contract was prepared and executed, the seller and the buyers had interlocking ownership and control, which to the court negates any claims of overreaching or unconscionability. This position is again reflected in section 5.02 of "Partners Consent and Agreement."

For purposes of this decision, U.C.C. section 2-609 under Illinois law provides no valid defense to the three defendant pipeline companies. If the statements of the DOE officials do provide a basis for seeking reasonable assurance of performance, the response by the DOE goes beyond the obligations imposed upon the United States by the contract language. The defendants cannot claim a repudiation, or an insufficient assurance, as a matter of law when the assurance given assumes a greater burden than the underlying contract. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976) (party may not demand more assurance than that to which it is entitled under the contract); and *Gardner Engineering Corp. v. Page Engineering Corp.*, 484 F.2d 27 (8th Cir. 1973) (party not entitled to receive more assurance than that demanded). *See also Louisiana Power & Light Co. v. Allegheny Ludlum Indus., Inc.*, 517 F. Supp. 1319 (E.D.La. 1981), in which the district court ruled that a *late and* qualified offer of performance cannot be considered adequate assurance under section 2-609. *Id.* at 1323. We can analogize from *Louisiana Power* that a timely assurance of super-

contractual performance is adequate. This court also notes that the provisions of the Uniform Commercial Code are to be broadly interpreted with an eye toward promoting its underlying purposes and policies. *U.C.C. section 1-102(1)*. This court declines to adopt the mirror-image approach asserted by the defendants.

A review of the draftsmen's Comments to section 2-609 leads to the conclusion that to give to this section the effect sought by the defendants would be a perversion of the purpose and intent of the law. Its commercial purpose is to allow a buyer or supplier to take steps to guarantee performance where non-performance would create economic loss and alternate solvent suppliers or buyers are available. There is no question that in this case non-performance confers an economic benefit upon the customers of defendant rather than a hardship, and the request for assurance of performance is a subterfuge.

The balance of the matters raised in defense to the motion are without merit.

The change in economic reality as opposed to economic projections may have a bearing upon the wisdom of the contracting parties, but does not render the contract unenforceable. The parties found it desirable to give the seller a list of escape routes, including "any other reason not enumerated hereabove." They also found it desirable, or necessary to satisfy the lender, to limit the options of the buyers, at the expense of their customers. The basic escape route provided buyers is through FERC disapproval. It is possible that at some future date FERC action may provide an excuse for non-performance, but under the undisputed facts, the United States as successor in interest to the FFB and the "partnership" holds a valid and enforceable contract right.

The court treats this matter as a commercial contract dispute. The request in count 3 for the injunctive relief appears premature. The court will not grant injunctive

relief and clothe the plaintiff with the right to invoke the contempt powers of the court without a further showing of necessity.

Plaintiffs have moved for summary judgment of damages due by virtue of non-payment or under-payment by Natural. In ruling in favor of plaintiffs on count 2, the determination of contract rights, the court has found the defendant pipeline companies liable to the plaintiff for the difference between the contract price and the market value price actually paid. As the computation varies and increases each month and the obligation is continuing, the court requests that plaintiff provide the court with its computation of the amounts due from Natural for all gas delivered or tendered through the month of December, 1985. The complaint does not seek a money judgment against other defendants. If objections are made to the computations, an evidentiary hearing will be scheduled thereon. In connection therewith, it is the position of the court that any future action by FERC in prohibiting spreading of contract price gas through to consumers can only operate to excuse performance after the date of such order and not relieve defendants of the duty to make payment for gas tendered or delivered, the costs of which could, at the time of delivery, have been spread through to consumers.

IT IS ORDERED:

The motion of the plaintiffs for summary judgment for foreclosure is *granted*

The motion for summary judgment determining the validity of the Gas Purchase Contract is *granted*

The motion for injunctive relief in *denied*

The motion for money damges judgment is held in abeyance pending submission of current statements of account, as provided above

Dated this 14th day of January, 1986, at Bismarck, North Dakota.

/s/ Patrick A. Conmy
PATRICK A. CONMY
Chief Judge
United States District Court

[Entered Jan. 14, 1986]

(3)

No. 92-516

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

DAKOTA GASIFICATION COMPANY
and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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December 16, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the Eighth Circuit properly applied common law rules of contract construction to determine that the Secretary of Energy (and its successor-in-interest, Dakota Gasification Company) did not agree to arbitrate disputes with Petitioner.

STATEMENT PURSUANT TO RULE 29.1

Dakota Gasification Company's parent corporation is Basin Electric Power Cooperative. Dakota has no subsidiaries to be listed under this Rule.

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DAKOTA GASIFICATION COMPANY

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UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT DAKOTA GASIFICATION COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Dakota Gasification Company (hereinafter "Dakota") urges the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. The court below correctly construed the contracts at issue to determine that there is no agreement which would require the United States and

its successor-in-interest, Dakota, to arbitrate claims against the defendants.

STATEMENT OF THE CASE

The sole issue in the case below was whether the Secretary of Energy (and its successor, Dakota) agreed to arbitrate disputes under reinstated contracts for the sale and transportation of synthetic gas manufactured by the Great Plains Gasification Project ("the Project"). The original contracts were part of a complex transaction to federally finance the construction of a one-of-a-kind synthetic fuels plant. The plant was built to demonstrate the feasibility of manufacturing synthetic natural gas from coal on a commercial scale.

Background

Affiliates of five interstate pipelines formed a partnership to finance, construct and own the Project. The partnership required four affiliated pipelines to execute long-term high-cost Gas Purchase Agreements so as to ensure a market for the synthetic gas.[1]

The Federal Financing Bank agreed to lend up to $2 billion to the partnership for the construction of the Project provided that the Secretary of Energy would guarantee the loan. As a condition precedent to guaranteeing the loan, the Secretary of Energy required each of the pipelines to enter into the Pipe-

[1] The four pipeline purchasers are Petitioner, Transcontinental Gas Pipe Line Corporation, ANR Pipeline Company, Natural Gas Pipeline Company of America and Tennessee Gas Pipeline Company. The latter three have filed a brief in support of the Petition. The four pipeline purchasers are jointly referred to as the "pipelines."

line Affiliates Agreement. Therein, the pipelines promised the Secretary that if their partner affiliates defaulted on the guaranteed loan, the pipelines would agree to reinstate the Gas Purchase Agreements with the Secretary of Energy in accordance with the terms of the Pipeline Affiliates Agreement.

Original Gas Purchase Agreements

The four identical original Gas Purchase Agreements were negotiated between the partnership and the four affiliated pipelines.[2] The pipelines guaranteed the partnership a long-term (25 years) market for the *entire* output of the Project and agreed to pay top of the market prices for the synthetic gas. Execution of the original Gas Purchase Agreements by the pipelines was a condition precedent of the partner affiliates' agreement to invest capital and construct the Project. Pet. App. at F-19, Article XII, § 1. The partnership and their affiliated pipelines agreed to resolve disputes under the original Gas Purchase Agreements through binding arbitration. Pet. App. at F-24, Article XVIII. They further agreed that the law of Illinois would apply to disputes under the agreements. Pet.

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[2] At the time the original Gas Purchase Agreements were executed, it had not been resolved how the synthetic gas would be delivered from the plant for further transportation to the pipeline purchasers' markets. The Gas Purchase Agreements therefore required that the parties execute transportation agreements before the plant was placed into operation. Petitioner's Appendix at F-10 to F-11 ("Pet. App. at ___"), Article VI, § 2. Each of the pipelines fulfilled this obligation by executing a Synthetic Gas Transportation Agreement with GPGA in June 1983. Pet. App. G. These transportation agreements are mere adjuncts to the Gas Purchase Agreements and should be construed as such. The Secretary of Energy was not a party to those agreements.

App. at F-24, Article XVII. Finally, the partnership and their affiliated pipelines agreed that in the event of default, the contracts could be assigned to the Secretary or his designee. Pet. App. at F-22, Article XIV.

The Pipeline Affiliates Agreement

The Secretary of Energy was not a party to the original Gas Purchase Agreements. Rather, the Secretary's rights concerning the sale of synthetic gas in the face of default and foreclosure were protected through the simultaneously executed Pipeline Affiliates Agreement, under which the pipelines agreed to reinstate the Gas Purchase Agreements in the event of default. Pet. App. at H-2, § 2.02. That agreement expressly provides that disputes with respect to the Secretary's rights would be litigated in federal district court in North Dakota or the District of Columbia. Pet. App. at H-9 to H-10, § 4.10 It further provides that federal law, as opposed to the law of Illinois, would control. Pet. App. at H-6, § 4.02. Moreover, to ensure the Secretary the option of selling the plant, the Pipeline Affiliates Agreement expressly states that the rights of the Secretary would enure to the benefit of his successors. Pet. App. at H-9, § 4.07.

Default and Reinstatement

The partnership defaulted in 1985. Despite the Secretary's right to become successor-in-interest to the partnership under the original Gas Purchase Agreements, the Secretary terminated the original Gas Purchase Agreements and reinstated them pursuant to the Pipeline Affiliates Agreement. The pipelines challenged the reinstatement and the Secretary brought suit to enforce the Reinstated Gas Purchase Agreements. The pipelines raised affirmative defenses re-

lated not only to the Secretary's reinstatement but also to the pipelines' obligations under the Reinstated Gas Purchase Agreements.[3] Both the district court and the court of appeals held that the pipelines were obligated to continue to purchase the entire output of the Project at the formula based prices under the Reinstated Gas Purchase Agreements with the Secretary. *United States v. Great Plains Gasification Associates*, 819 F.2d 831, 834 (8th Cir. 1987).

Sale to Dakota and Resulting Disputes

In October 1988 Dakota purchased the Project from the Secretary of Energy and the Secretary assigned the Reinstated Gas Purchase Agreements to Dakota. Dakota committed to continue operating the Project so long as revenues from the sale of synthetic gas under the Reinstated Gas Purchase Agreements exceed expenses, or until the Reinstated Gas Purchase Agreements terminate or expire. Thus, as successor-in-interest to the Secretary, Dakota has a critical interest in the enforcement of the gas purchase agreements.

Immediately upon the closing of Dakota's agreement with the Secretary, one of the pipelines challenged the assignment of the Reinstated Gas Purchase Agreements to Dakota. Others renewed old challenges to their volumetric purchase obligations and the price owed under the Reinstated Gas Purchase Agreements.

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[3] The pipelines sought to limit their purchase obligation to an amount less than their contractual shares of the entire output of the Project. There was also an effort to limit the price to a market based price as opposed to the formula based prices in the Gas Purchase Agreements.

The Present Litigation

In 1990, ANR demanded arbitration of disputes concerning the volume it must purchase under its Reinstated Gas Purchase Agreement and the price it must pay under both the purchase and transportation agreements. Dakota and the Secretary of Energy brought one suit to resolve all the issues with all the pipelines. The pipelines filed motions to dismiss claiming that the disputes must be individually arbitrated. The district court dismissed the action. The Eighth Circuit reversed, holding that the Secretary of Energy and its successor, Dakota, had preserved the prerogative to litigate disputes arising under the contracts as reinstated through the Pipeline Affiliates Agreement.[4]

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate that this Court should grant certiorari to review the decision of the

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[4] Neither the district court nor the Eighth Circuit reached the question of what arbitration law would apply if the United States and Dakota were subject to an agreement to arbitrate. Contrary to Petitioner's assertions, it is not clear that federal law would apply. The Gas Purchase Agreements as originally in effect were to be "governed and interpreted in accordance with the Laws of the State of Illinois." Pet. App. at F-24, Article XVII. Thus, if the reinstatement of the Gas Purchase Agreements pursuant to the Pipeline Affiliates Agreement did not affect the terms of those agreements (as the pipelines contend), then any arbitration under those agreements would be governed by Illinois arbitration law, Ill. Rev. Stat. ch. 10, ¶¶ 101 *et seq.* *See Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) ("Just as [parties] may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.").

Eighth Circuit and has provided no basis for summary reversal of the decision below.

1. The Decision of the Eighth Circuit Does Not Conflict With the Decisions of This Court

This Court has unequivocally established that where the parties have agreed to arbitrate, that agreement will be enforced. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).[5] *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Agreements to arbitrate should be placed " 'upon the same footing as other contracts . . . .' " *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974), quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

It is equally well established that arbitration will be ordered only where the parties agree, by contract, to arbitrate. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49 (1986). *See also Dean Witter Reynolds*, 470 U.S. at 219.

Therefore, the "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors*, 473 U.S. at 626. In resolving the question of whether the parties have agreed to arbitrate, the court applies "general state-law principles of con-

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[5] *Dean Witter Reynolds* involves construction of the Federal Arbitration Act, which itself arose out of an effort "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." 470 U.S. at 219-20. The Federal Arbitration Act and the decisions involving its application have laid such hostility to rest.

tract interpretation . . . ." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 475-76 (1989).

Consistent with the straight-forward teaching of these cases, the Eighth Circuit simply applied common law principles of contract interpretation to the contracts at issue to determine whether the Secretary of Energy and its successor, Dakota, had agreed to arbitrate disputes. The Eighth Circuit determined that the Secretary (and its successor) had not agreed to resolve disputes through arbitration.

In *Volt* the Court explained the federal policy favoring arbitration, articulated in cases such as *Moses H. Cone*,[6] as "simply [ensuring] the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476. The Eighth Circuit's interpretation of the contracts before it, holding that the United States (and its successor) are not required to arbitrate because they have not agreed to do so, offends neither the rules of liberal construction set forth in *Moses H. Cone*, nor any other decision of this Court.

2. The Decision Does Not Create a Conflict Between the Circuits

Petitioner seeks to manufacture a non-existent conflict between the circuits by erroneously arguing that *Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987), stands for a black letter rule that an arbitration clause "trumps" a forum selection clause. It does not. Such a rule of preference—without regard to the contracts at issue—

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[6] *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

would violate this Court's dictate that arbitration is appropriate only where the parties have agreed, by contract, to arbitrate. *Mitsubishi Motors*, 473 U.S. at 625. Such a rule would further conflict with this Court's ruling that the court should apply general state law principles of contract interpretation in determining whether the parties have agreed to arbitrate. *Volt*, 489 U.S. at 475-76.

Application of this Court's arbitration precedents to the disparate facts in *Patten Securities* and the decision of the Eighth Circuit demonstrates that *Patten Securities*, like the decision of the Eighth Circuit, is fact bound. There is no conflict between the circuits.

The *Patten Securities* court was faced with construing two simultaneously effective clauses: one an arbitration clause in the NASD member rules and the other a forum selection clause in the underwriting agreement. Tacitly applying the rules of construction that the agreements must be read together and that where possible both agreements should be given effect, the Third Circuit reconciled the two clauses. It held that the parties had agreed to arbitrate and that the forum selection clause would limit the venue of the court that could enforce the award in arbitration.

The Eighth Circuit faced very different facts. First, unlike *Patten Securities*, the contracts presented to the Eighth Circuit demonstrated that the forum selection clause and the arbitration clause (in the original contracts) could never be effective at the same time. Rather, the forum selection clause (in the Pipeline Affiliates Agreement) would become effective *only* if the partners defaulted on the mortgage and the

Secretary terminated and reinstated the contracts under the Pipeline Affiliates Agreement.

Petitioner itself has illustrated the difference between the two factual settings, since Petitioner does not seek in this case the same result reached in *Patten Securities*. The forum selection clause at issue here designates only the federal courts of North Dakota and the District of Columbia for the resolution of disputes. If that clause were to be construed in accordance with the holding in *Patten Securities*, then any arbitration award between the Petitioner and Dakota could only be enforced in one of those two forums. Yet Petitioner insists upon the right to pursue its arbitration against Dakota within the context of an action in federal court in Texas.[8]

A second, critical difference between this case and *Patten Securities* is that the Secretary of Energy was not a party to the contract with the arbitration clause *and* lacked the authority to agree to such arbitration. The Secretary of Energy had not been given the statutory authority needed to bind the United States to resolve disputes through arbitration and therefore could not agree to arbitrate its disputes under the reinstated contracts. As the Eighth Circuit held, the Secretary preserved the prerogative to litigate disputes involving its rights under the reinstated contracts through the execution of the Pipeline Affiliates Agreement.

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[7] *Transcontinental Gas Pipe Line Corp. v. Dakota Gasification Co.*, Civil Action No. H-90-3453 (S.D. Tex.). Dakota has preserved its right to appeal the Texas decision at such time as Petitioner may seek to enforce an arbitration award.

The Third Circuit itself recognized in *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989), that the pro-arbitration policy "does not prevent parties from agreeing to exclude matters from arbitration if they so desire." *Id.* at 733 (citing *Volt Information Sciences*). In *Ballay*, a securities dealer sought to invoke the arbitration clauses in its customer contracts to compel arbitration of its customers' claims under the federal securities laws. The Third Circuit affirmed the district court's interpretation of those arbitration clauses as not covering the claims at issue.

The decision below and *Patten Securities* are not in conflict. Neither decision establishes a rule of preference for cases which involve both an arbitration clause and a forum selection clause. Rather, both cases stand for the unremarkable proposition that a court must apply the general principles of contract construction to determine whether the parties have agreed by contract to arbitrate a dispute. *Mitsubishi Motors*, 473 U.S. at 625-26. Both courts applied those general rules of construction to reach the result dictated by the specific facts presented. Neither case establishes a blind rule and the decisions do not conflict.[8]

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[8] Petitioner briefly cites *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34 (5th Cir. 1990), and *Travel Consultants, Inc. v. Travel Management Corp*, 367 F.2d 334 (D.C. Cir. 1966), to bolster its claim of a conflict among the circuits. Neither case involves a conflict between an arbitration provision and a forum selection clause. Rather, each case simply involves a fact-specific determination as to the scope of an arbitration clause in one of several contracts.

3. The Decision Raises No Significant Issues

Despite the efforts of Petitioner to paint this decision as one with "important consequences" for alternative dispute resolution, it is not. This case is consistent with the law of this Court and the Eighth Circuit favoring enforcement of arbitration agreements. Moreover, the decision in this case is limited to its facts and simply will not have an effect on the enforceability of arbitration clauses.

The Eighth Circuit has a well established body of law fully recognizing the liberal federal policy favoring enforcement of arbitration agreements. *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986); *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370 (8th Cir. 1983). However, there is no policy blindly requiring arbitration regardless of the agreement of the parties; there is merely a policy which favors the enforcement of arbitration *agreements. AT&T Technologies, Inc.* 475 U.S. at 648-49 (1986); *I.S. Joseph Co.*, 803 F.2d at 399-400 (an order compelling arbitration "must find its source in a *real agreement* between the parties," as "determined under the common law of contract") (emphasis added).

The panel decision does not modify the law of the Eighth Circuit concerning arbitration. Significantly, the decision was brought to the entire Eighth Circuit through a suggestion for rehearing *en banc*, where the pipelines argued that the decision conflicted with the Eighth Circuit's law on arbitration. After requesting briefs responding to the suggestion for rehearing *en banc*, the Eighth Circuit denied such rehearing and allowed the panel decision to stand.

This decision involves nothing more than the application of rules of contract construction as described

by *Williston* and *Corbin* to a unique and complex set of contracts involving an equally complex and novel transaction. The Secretary of Energy agreed to guarantee a loan of up to $2 billion made by the Federal Financing Bank to private parties for financing, construction and operation of a plant which would demonstrate the commercial feasibility of manufacturing synthetic natural gas from coal. The contracts reflect the special interest of the federal government as loan guarantor, and the interpretation of those contracts by the Eighth Circuit does not signal a departure from the well established precedents to enforce agreements to arbitrate.

4. The Eighth Circuit Reached the Correct Result

The decision of the Eighth Circuit below turns on the interpretation of conflicting provisions of separate contracts simultaneously executed as part of the same transaction. The pipelines asked the court to find a construction of the Pipeline Affiliates Agreement that would not affect their purported arbitration rights under the originally executed Gas Purchase Agreements.

The pipelines' arguments ignore the fact that the government conditioned its guarantee on the pipelines first signing the Pipeline Affiliates Agreement and that, therefore, "the Gas Purchase Agreements and the Pipeline Affiliates Agreement must be interpreted collectively, and not in isolation . . . ." Pet. App. at A-8.

The Pipeline Affiliates Agreement expressly stated that its execution was "a condition precedent to the issuance of the Guarantee by the Secretary," and that the parties "consent to the jurisdiction in any United

States District Court . . . in connection with any suit to enforce the rights of the Secretary hereunder." Pet. App. at H-1; Pet. App. at H-9 to H-10.[9]

In order to give the Pipeline Affiliates Agreement its intended effect, the Gas Purchase Agreements as reinstated following default by the affiliated Project sponsors must be subject to the dispute resolution provision that the pipelines and the Secretary of Energy agreed to in the Pipeline Affiliates Agreement. The Pipeline Affiliates Agreement expressly provided that the Secretary's benefits "shall enure to the benefit of . . . successors . . . ." Pet. App. at H-9.

The Eighth Circuit applied the rules governing interpretation of simultaneously executed contracts to the agreements before it and properly concluded that the pipelines agreed, by entering into the Pipeline Affiliates Agreement, that disputes arising under the Reinstated Gas Purchase Agreements would be litigated.

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[9] The pipelines, as well as the dissent below, would construe this clause as applying only to the one-time act of reinstating the Gas Purchase Agreements, and not to those contracts as reinstated. However, such a narrow construction simply ignores the fact that the Secretary of Energy lacks the statutory authority to submit disputes with the United States to binding arbitration. It also ignores the record of the United States' suit to reinstate those contracts in which the pipelines raised and litigated issues involving their obligations under those contracts. *United States v. Great Plains Gasification Associates*, 819 F.2d 831, 834 (8th Cir. 1987). If the issues arising under those contracts had been subject to arbitration, as the pipelines now assert, the pipelines should have moved to sever those issues for arbitration. *See DeanWitter Reynolds*, 470 U.S. at 217; *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 62 (8th Cir. 1984). They did not.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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No. 92-516

In the Supreme Court of the United States

OCTOBER TERM, 1992

TRANSCONTINENTAL GAS PIPE LINE CORP., PETITIONER

v.

DAKOTA GASIFICATION CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted several contracts to entitle the Department of Energy and its successor-in-interest, the Dakota Gasification Company, to litigate rather than arbitrate their commercial disputes with four gas pipeline companies.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 964 F.2d 732. The opinion of the district court (Pet. App. B1-B6) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A14-A15) was entered on May 4, 1992. A petition for rehearing was denied on June 25, 1992. Pet. App. E. The petition for a writ of certiorari was filed on September 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the early 1980s, a partnership called Great Plains Gasification Associates (Great Plains) built a factory in North Dakota to extract synthetic natural gas from lignite coal. Great Plains was composed of four pipeline companies (the Pipelines)—petitioner Transcontinental Gas Pipe Line Corporation (Transco), Tennessee Gas Pipeline Company (Tennessee), ANR Pipeline Company (ANR), and Natural Gas Pipeline Company of America (Natural)—as well as an additional investor.[1] In addition to funds provided by the partners, construction of the plant was financed by a $1.5 billion loan guaranteed by the Department of Energy (DOE) and secured by a mortgage on the real and personal property of the project. Pet. App. A2, C2.

Prior to completion of the plant, Great Plains entered into a Gas Purchase Agreement with each Pipeline. See Pet. App. Fi-F25. Great Plains agreed to sell, and each Pipeline agreed to purchase, a stated percentage of the total synthetic gas output of the gasification plant for 25 years at formula prices. *Id.* at F3-F4. Each Gas Purchase Agreement provided that "[a]ny dispute between the parties arising out of this Agreement * * * shall be tried by arbitration pursuant to the Rules of the American Arbitration Association in effect at the time of such arbitration." *Id.* at F24.

Contemporaneously with the execution of the Gas Purchase Agreements, each Pipeline entered into a Pipeline Affiliates Agreement with DOE. Pet. App. H1-H10. Under the Pipeline Affiliates Agreement, which

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[1] Tennessee, ANR, and Natural have filed a brief in support of Transco's petition for certiorari. The fifth partner is not involved in this litigation.

was a condition precedent to DOE's loan guarantee, each Pipeline agreed to perform all of its material obligations under the Gas Purchase Agreement to which it was a party, and to reinstate its respective Gas Purchase Agreement with the Secretary of Energy or his designee in case Great Plains defaulted on the loan and DOE assumed operation of the project. *Id.* at H2. The Pipelines agreed to submit to the jurisdiction of designated federal courts, and to the application of federal law, in any suit brought "to enforce the rights of the Secretary" under the Pipeline Affiliates Agreement. *Id.* at H9-H10.

2. On August 1, 1985, Great Plains defaulted on its obligation and terminated its participation in the gasification plant. DOE honored its loan guarantee and assumed operation of the project. The Secretary of Energy was substituted for Great Plains as the Seller under the Gas Purchase Agreements upon their reinstatement pursuant to the Pipeline Affiliates Agreement. Pet. App. A3-A4.

After Great Plains's default, and in reaction to a continuing downward trend in gas prices, Natural filed suits challenging the validity of the Gas Purchase Agreements in Illinois state court and the United States District Court for the District of Columbia. The United States subsequently filed a complaint in the United States District Court for the District of North Dakota seeking, in part, foreclosure on its mortgage on the gasification plant and a declaration that the Gas Purchase Agreements were valid and enforceable. The two lawsuits filed by Natural were consolidated with the government's action. See Gov't C.A. Br. 7-10.

On January 14, 1986, the district court entered summary judgment in favor of the United States, upholding the enforceability of the Gas Purchase Agreements and

granting the United States its right to foreclose on the mortgage. Resp. Br. in Supp. App. 1a-20a. The Eighth Circuit affirmed the district court's summary judgment on the issue of foreclosure, *United States* v. *Great Plains Gasification Assocs.*, 813 F.2d 193 (1987), and on the issue of the validity and enforceability of the Gas Purchase Agreements, *United States* v. *Great Plains Gasification Assocs.*, 819 F.2d 831 (1987). This Court denied the Pipelines' petition for certiorari. *A N R Gasification Properties Co.* v. *United States*, 484 U.S. 924 (1987).

3. On October 7, 1988, Dakota Gasification Company (Dakota) entered into an Asset Purchase Agreement with DOE, pursuant to which DOE transferred to Dakota all of the real and personal property of the plant, including DOE's rights under the four reinstated Gas Purchase Agreements, in exchange for $85 million in cash, plus $1.6 billion to be generated by plant revenues over the next 18 years. Pet. App. A4; C.A. App. 263-477. Dakota assumed operation of the plant, and continued the production and sale of the synthetic natural gas consistent with its obligations as Seller under the four Gas Purchase Agreements. Disputes soon arose with respect to the Pipelines' contractual obligations under the Gas Purchase Agreements. See Pet. App. A5.

4. Dakota filed suit in the United States District Court for the District of North Dakota to determine, once again, the parties' rights and obligations under the Gas Purchase Agreements. The United States successfully moved to intervene in the suit because, under the Asset Purchase Agreement, it has a substantial financial stake in the plant's revenues and profitability. Pet. App. A5 n.6.

Each of the Pipelines sought arbitration of the issues raised by Dakota's action, and moved for dismissal on the ground that the arbitration clauses precluded litigation of those issues. On January 11, 1991, the district court granted summary judgment in favor of the defendants, concluding that the arbitration clauses in the Gas Purchase Agreements were valid and binding. Pet. App. B4-B5. Each Pipeline then commenced separate arbitration proceedings, subjecting Dakota to arbitration in four different States.

5. The court of appeals reversed. The court began by observing the common-law rule that "the Gas Purchase Agreements and the Pipeline Affiliates Agreement 'should be read together as they represent successive steps which were taken to accomplish a single purpose.'" Pet. App. A6 (quoting *St. Paul Fire & Marine Ins. Co.* v. *Tennefos Constr. Co.*, 396 F.2d 623, 628 (8th Cir. 1968)). Construing the contracts together, the court held that "under the facts of this case, * * * if the Secretary or its successor-in-interest has a dispute with the Pipelines concerning the Gas Purchase Agreements, the former parties can successfully demand that the dispute be litigated in the designated federal courts." Pet. App. A7. Judge Magill dissented. *Id.* at A9-A13.

ARGUMENT

This case does not present any broad legal issues of relevance to other cases. Instead, this case turns on the proper construction of the terms of a contract between petitioner and the Department of Energy. The court of appeals correctly interpreted those terms. Its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Contrary to petitioner's assertion (see, *e.g.*, Pet. 9), the decision below does not conflict with the "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), or any decision of this Court. Nothing in that policy requires federal courts to conclude that parties have agreed to arbitrate their disputes when the terms of the contract provide otherwise. The Secretary did not—and could not—agree to arbitrate any disputes with the Pipelines.

a. The purpose of the Federal Arbitration Act is simply "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985), and to place such agreements "upon the same footing as other contracts," *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). To that end, the Act declares that a written agreement to arbitrate in any contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, and provides a remedy for a party seeking to compel arbitration, 9 U.S.C. 4.

As this Court recently stated, however, Section 4 of the Act "does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'" *Volt Information Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 474-475 (1989) (quoting 9 U.S.C. 4). Indeed, the Act only "directs the federal court to order arbitration *once it is satisfied that an agreement for arbitration has been made* and has not been honored." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395,

400 (1967) (emphasis added). Arbitrability is a matter of contract, and "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

b. There are two contracts directly at issue in this case: The Gas Purchase Agreements and the Pipeline Affiliates Agreement. Pet. App. A5.[2] The court of appeals correctly observed that the contracts were executed contemporaneously and, therefore, concluded that they should be interpreted collectively. *Id.* at A6. Indeed, petitioner concedes that the court correctly construed the agreements "together as a single contractual undertaking." Pet. 11. Reading the two contracts in this fashion indicates that the Pipelines contracted to arbitrate claims under the original Gas Purchase Agreements they negotiated with Great Plains, and to litigate claims with the Secretary in the event Great Plains defaulted.[3] It is well settled that parties may agree to arbitrate some claims and litigate others. See, *e.g.*, *Mitsubishi*, 473 U.S. at 628. This interpretation of

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[2] Great Plains also entered into Synthetic Gas Transportation Agreements with each Pipeline. See Pet. App. G1-G13. The court of appeals did not discuss these agreements, and petitioner does not appear to rely on them in this Court. The other Pipelines recognize that the interpretation of the arbitration clauses in the Transportation Agreements "is not relevant to this petition." Resp. Br. in Supp. 2 n.1.

[3] Dakota succeeded to the United States' interests in 1988. The court of appeals correctly concluded that because Dakota stands in the shoes of the Secretary for purposes of these contracts, it is no more bound by the original arbitration clauses than was the Secretary. Pet. App. A8. Petitioner does not challenge that determination in this Court.

the agreements is firmly grounded in the text of the documents and the surrounding circumstances.

(i.) Only the Gas Purchase Agreements contained an arbitration provision.[4] The Secretary was not a party to those agreements, however. In contrast, the Pipeline Affiliates Agreement—the sole contract to which the Secretary was a party—addresses the contingency of a relationship between the Pipelines and the United States Department of Energy, which would become the Seller in the event of default. This Agreement provides for litigation, not arbitration. It would defeat the very purpose of this contract to permit arbitration in this case.

The Pipeline Affiliates Agreement contains several provisions designed to protect the interests of the United States, and was explicitly made a condition precedent to the government's guarantee of the $1.5 billion loan to build the gasification plant. Pet. App. H1. This Agreement requires the Pipelines to reinstate the Gas Purchase Agreements with the government following default by Great Plains, and contains the Pipelines' promise to perform their obligations under the Gas Purchase Agreements. *Id.* at H2. It provides that the Pipelines' covenants continue until the indebtedness is paid and states that the rights of the Secretary inure to the benefit of successors in interest, so that DOE need not be the long-term operator of the plant. *Id.* at H8-H9. To ensure protection of these federal interests in the event of a default, the Agreement provides that the rela-

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[4] Because the government had assumed operation of the project before the commencement of this litigation, the court of appeals did not decide whether the arbitration clauses contained in the Gas Purchase Agreements would have been enforceable as between the Pipelines and Great Plains had Great Plains not defaulted.

tionship between the Pipelines and the Secretary is governed by federal law and requires the Pipelines to consent to the jurisdiction of specific federal courts to resolve disputes. *Id.* at H6 ("the rights and obligations of the parties shall be governed by and construed and interpreted in accordance with the federal laws of the United States"); *id.* at H9-H10 ("[t]he parties hereto consent to the jurisdiction in any United States District Court located in the District of Columbia or North Dakota, in connection with any suit to enforce the rights of the Secretary hereunder").

(ii.) The conclusion that these provisions were intended to require litigation of all disputes between the Secretary (or his successor in interest) and the Pipelines is further confirmed by the fact that the Secretary lacked legal authority to agree to binding arbitration. Absent specific statutory authority, DOE could not, as a branch of the federal government, submit controversies to binding arbitration or allow private parties to decide disputes concerning the United States. See, *e.g.*, 32 Comp. Gen. 333 (1953); 33 Op. Atty. Gen. 160 (1922). Although the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, codified at 5 U.S.C. 581 *et seq.*, generally leaves agencies free to agree to arbitration (see 5 U.S.C. 585), it does not apply here because the Pipeline Affiliates Agreement predates the November 15, 1990 date of enactment. See generally *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). Therefore, although the arbitration clause could serve the original relationship between the Pipelines and Great Plains, the Secretary's relationship with the Pipelines could only be governed by the jurisdictional clauses contained in the Pipeline Affiliates Agreement.

(iii.) The court of appeals therefore correctly concluded that the arbitration provisions in the original Gas Purchase Agreements were superseded by the federal litigation clauses in the Pipeline Affiliates Agreement after the default.[5] When Great Plains defaulted on its obligations, the original Gas Purchase Agreements terminated. After the government exercised its rights under the mortgage, the Gas Purchase Agreements were reinstated pursuant to and subject to the terms of the Pipeline Affiliates Agreement. By incorporating the basic production, pricing and delivery terms of the original Gas Purchase Agreements into the provisions of the Pipeline Affiliates Agreement, the parties were bound by a modified contractual arrangement.[6]

The different dispute resolution procedures thus reflected the new commercial relationship resulting from the accession of the United States Government to the

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[5] The Pipelines supporting petitioner criticize the court of appeals for reversing the district court's contrary interpretation of the contracts. Resp. Br. in Supp. 3 n.2. It is well settled, however, that the interpretation of contracts is a question of law reviewed de novo by the appellate court. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 n.7 (1984) (undertaking independent evaluation of scope of arbitration clause).

[6] The argument (Resp. Br. in Supp. 7 (emphasis omitted)) that the arbitration clause remains in effect because the Gas Purchase Agreements were to be reinstated "on the same terms," and arbitration is a "term," ignores the context of the cited provision. The contract provides that each Pipeline "will continue to *take or pay for gas* as provided [in the Gas Purchase Agreements] on the same terms as were in effect prior to such termination and reinstatement." Pet. App. H2 (emphasis added). The clear import is that the complex pricing, measurement, and delivery provisions of the Gas Purchase Agreements (see *id.* at F3-F18) would remain in effect following reinstatement.

position formerly held by Great Plains. In light of the pivotal role played by DOE in financing the plant, and the concessions made by the Pipelines in the Pipeline Affiliates Agreement, the court of appeals correctly found that the parties intended to provide the Secretary the prerogative to litigate disputes in federal court upon the default of Great Plains. Pet. App. A8. The jurisdictional provisions of the Pipeline Affiliates Agreement were bargained over and agreed to by the Pipelines, and form substantive terms of the contract to which the courts must give effect. See generally *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (recognizing importance of bargained-for forum selection clauses). Because they evidence the intention of the parties to provide the Secretary with the right to litigate disputes in federal court, they replaced inconsistent terms in the Gas Purchase Agreements, including the arbitration clauses. See *Bechtel Corp.* v. *Local 215, Laborers' Int'l Union*, 544 F.2d 1207, 1213 (3d Cir. 1976) (language of second contract containing an inconsistent dispute resolution clause prevails over clause in earlier agreement).

c. Petitioner concedes (Pet. 12) that the Secretary could bring an action in federal court to enforce the Pipelines' promise to reinstate the Gas Purchase Agreements, but maintains that this particular dispute falls outside the bounds of the jurisdictional clauses. Petitioner's construction is not supported by the parties' course of dealing or the language of the contract. Following Great Plains's default, the Pipelines litigated the enforceability of the Gas Purchase Agreements in a suit brought by the United States pursuant to the jurisdictional clauses in the Pipeline Affiliates Agreement. *United States* v. *Great Plains Gasification Assocs.*, *supra*. No claim was made that the dispute was not prop-

erly in federal court, reflecting the parties' mutual understanding that disputes with DOE under the reinstated Gas Purchase Agreements were to be litigated rather than arbitrated. Like disputes over reinstatement and enforceability, disputes over performance are properly litigated when the Secretary is a party.

Indeed, petitioner concedes that "the Secretary has the right to litigate in the specified federal courts those claims arising from the Pipelines' breach of *any* covenant * * * contained in the Pipeline Affiliates Agreement." Pet. 12 (emphasis added) (quoting Pet. App. A10 (Magill, J., dissenting)). In the Pipeline Affiliates Agreement, each Pipeline "covenant[ed]" to "perform all of its material obligations under the Gas Purchase Agreement to which it is a party." *Id.* at H2. The present litigation is nothing more than a dispute over the Pipelines' performance of their obligations under the Gas Purchase Agreements. *Id.* at A5 n.7 ("In its complaint, Dakota sought a ruling outlining the Pipelines' purchase obligations under the Gas Purchase Agreements."). The court of appeals therefore correctly determined that "under the Pipeline Affiliates Agreement, the Secretary contracted for the prerogative to litigate disputes affecting its rights (which includes the Gas Purchase Agreement obligations of the Pipelines) in designated federal courts." *Id.* at A8.[7]

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[7] Petitioner's complaint (Pet. 15; see also Resp. Br. in Supp. 4-7) that the court's ruling will disrupt arbitration proceedings currently proceeding pursuant to an order of a district court in Texas is misplaced. Even under the narrow reading of the Pipeline Affiliates Agreement urged by petitioner, the only courts with jurisdiction over an action to compel arbitration would be the district courts of North Dakota and the District of Columbia.

d. Where, as here, the contracts reveal that the party seeking to compel arbitration "had no such right in the first place," *Volt*, 489 U.S. at 475, such a finding does not offend the Act's objectives. See *id.* at 479 ("Arbitration under the Act is a matter of consent, not coercion."); *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"). While courts must "rigorously enforce agreements to arbitrate," *Dean Witter*, 470 U.S. at 221, there must be such an agreement before it can be enforced. By enforcing the parties' agreement here according to its terms, the court of appeals merely "recognized that the [Act] does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478.

2. Contrary to petitioner's assertion (Pet. 10-11), the decision in this case does not conflict with *Patten Securities Corp.* v. *Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987).

In *Patten Securities*, the Third Circuit was faced with a conflict between a forum selection clause in a securities underwriting agreement and a contemporaneous obligation imposed by the National Association of Securities Dealers (NASD) upon its members to submit all their disputes with customers to arbitration. See 819 F.2d at 406 ("Patten is compelled by its NASD membership to submit *even absent a specific contractual arbitration undertaking.*") (emphasis added). The starting point of the Third Circuit's analysis was that "absent a waiver Patten must submit to Diamond's arbitration demand." *Ibid.* The court merely held that an ambiguous forum-selection clause did not serve to waive the cus-

tomer's preexisting right to arbitration, because the federal preference for arbitration resolves the ambiguity.

Far from being "analytically indistinguishable" (Pet. 10), this case presents exactly the opposite situation. The Secretary had no preexisting obligation to arbitrate any dispute. Moreover, the Secretary never agreed—indeed, could not have agreed (see pages 9-10, *supra*)—to arbitration; on the contrary, the Pipelines agreed to litigate disputes with the Secretary. The "tiebreaker" function of the Act never comes into play here.[8] In contrast to the situation presented in *Patten Securities*, there is no need to reconcile a forum selection clause with an arbitration obligation because here there is no obligation to arbitrate. See *Dean Witter*, 470 U.S. at 219 ("The Act * * * does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.").

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[8] In his dissent below, Judge Magill found that the interpretation of the two contracts was ambiguous, and would have resolved the ambiguity in favor of the Pipelines. Pet. App. A12-A13. The majority, however, found the particular contracts involved here unambiguously to grant the Secretary the right to litigate. *Id.* at A8. The court's interpretation of the unusual agreements in this case rests squarely upon the conditions imposed by the federal government for its guarantee of the $1.5 billion loan to build the gasification plant, a unique and complex commercial venture. See *ibid.* (rejecting Pipelines' arguments because they "ignore the conditions under which the Secretary of Energy agreed to guarantee the financing for the gasification plant"). Given the peculiar facts of this case, further review of the contracts by this Court is not warranted. For the same reason, petitioner errs in asserting that the decision below "will have important and unfortunate consequences for arbitration as an alternative means of dispute resolution." Pet. 16.

The facts of the two cases are also very different. *Patten Securities* involved a relatively simple securities transaction and the resulting dispute between an underwriter and its customer. The Third Circuit did not confront the introduction of important federal interests into a commercial transaction as a result of default under massive federal financing. The court of appeals in this case held that in order to protect those interests, and as a condition to the issuance of the loan guarantee, DOE demanded and received the right to litigate its disputes in federal court in the event of a default. Pet. App. A7. *Patten Securities* does not undermine or conflict with that holding in any way; indeed, the Third Circuit could have no quarrel with the decision below because it merely enforced the parties' agreements according to their terms. See, *e.g.*, *Ballay* v. *Legg Mason Wood Walker, Inc.*, 878 F.2d 729, 733-734 (3d Cir. 1989) (affirming order denying motion to compel arbitration where contract evidenced intention not to be bound by arbitration clause).[9]

3. There is no merit to petitioner's claim that "because of the well-established precedents of this Court

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[9] Two other cases cited by petitioner (Pet. 11) as conflicting "in principle" with the decision below are inapposite. In *Neal* v. *Hardee's Food Sys., Inc.*, 918 F.2d 34 (5th Cir. 1990), and *Travel Consultants, Inc.* v. *Travel Management Corp.*, 367 F.2d 334 (D.C. Cir. 1966), the courts did, as petitioner asserts, hold that "contracting parties must arbitrate all disputes arising under agreements in which covenants to arbitrate appear, even if other related and simultaneously executed agreements contain no such covenants." Pet. 11. The parties in those cases, however, unlike the Secretary here, were parties to the contracts containing the arbitration clauses; thus the courts reasonably held that they were bound to arbitrate disputes arising under them. The Secretary, not having agreed to arbitration, has no such obligation.

regarding the presumption of enforceability of arbitration agreements under the Act, this case is ripe for summary reversal." Pet. 4. Petitioner cites ten decisions of this Court in support of its argument that the decision below conflicts with the strong federal policy favoring arbitration. See Pet. iv. In every one of those cases, however, the parties had *entered into* a contract containing an arbitration clause; the question was the enforceability of the agreement or the arbitrability of a specific dispute.[10] Here, the Secretary simply was not a party to any contract containing an arbitration clause. As demonstrated above, the court correctly construed the contracts in this case to give the Secretary the right to litigate in federal court. "[T]he [Act] does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478.

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[10] See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1650-1651 (1991); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 478 (1989); *Volt*, 489 U.S. at 470; *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 223 (1987); *Mitsubishi*, 473 U.S. at 617; *Dean Witter*, 470 U.S. at 215; *Southland Corp.*, 465 U.S. at 4; *Moses H. Cone*, 460 U.S. at 4-5; *Scherk*, 417 U.S. at 508; cf. *Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) (leaving this "straightforward issue of contract interpretation" to the lower court on remand).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

DAKOTA GASIFICATION COMPANY AND
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Transcontinental Gas Pipe Line Corporation, petitioner, respectfully submits this reply brief in support of its petition for a writ of certiorari.

1. Introduction

Respondents muddy the water with extraneous facts and totally fail to address the strong federal policy favoring arbitration agreements. Respondents ground their argument on the specious proposition that there is not an agreement to arbitrate in this case. They seek to escape the arbitration provision that appears in plain English in the Gas Purchase Agreement by adopting the view of the Eighth Circuit that it doesn't mean anything. In other words, the Respondents say that the Eighth Circuit was correct in nullifying the covenant to arbitrate because it found it to be a nullity. This circular reasoning epitomizes the significant danger to arbitration agreements if the opinion below is not reversed.

The relevant facts are simple. This is a dispute over volumes and prices of gas being purchased under a Gas Purchase Agreement[1]. The parties to the Gas Purchase Agreement are Petitioner and Dakota Gasification Company ("Dakota"), two private, nongovernmental parties. The Gas Purchase Agreement provides that "dispute[s] between the parties arising out of this Agreement . . . shall be tried by arbitration . . ." Pet. App. F-24. The disputes at issue unquestionably arise out of the Gas Purchase Agreement. Petitioner seeks to arbitrate these disputes in accordance with the Gas Purchase Agreement. The district court upheld petitioner's right to do so. *Id.* at B-4.

The Eighth Circuit reversed, holding that the arbitration clause in the Gas Purchase Agreement was nullified by the forum selection clause in a contemporaneously executed Pipeline Affiliates Agreement between petitioner and the Department of Energy ("DOE"). *Id.* at A-5 to A-8. The Pipeline Affiliates Agreement gave DOE the right to reinstate the Gas Purchase Agreement should DOE foreclose on the plant. The forum selection clause of the Pipeline Affiliates Agreement gave DOE the right to sue in federal court to enforce its rights under the Pipeline Affiliates Agreement; but it wholly failed to address disputes arising under the Gas Purchase Agreement. *Id.* at H-10. The court of appeals expanded the forum selection clause in the Pipeline Affiliates Agreement to abrogate and supplant the covenant to arbitrate disputes arising under the Gas Purchase Agreement. *Id.* at A-8. To achieve this result, the court of appeals backhanded two important fundamental principles: (1) that even when read together, it is possible to harmonize the Gas Purchase Agreement's arbitration clause and the Pipeline Affiliates Agreement's forum selection clause to legitimately effectuate both provisions, App. A

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[1] There is also a dispute under a Gas Transportation Agreement that contains a virtually identical arbitration clause. The Eighth Circuit wholly failed to address the covenant to arbitrate in the Gas Transportation Agreement, creating significant uncertainty regarding the effect of its opinion upon that agreement.

at 10; and (2) that cases of ambiguity or conflict should be resolved in favor of arbitration. *Volt Info. Sciences Inc. v. Board of Trustees*, 489 U.S. 468, 476 (1989); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Respondents are manifestly wrong when they say that the parties did not agree to arbitrate disputes in this case. Dakota Br. in Opp. 7. The agreement to arbitrate exists in black and white. App. F at 24. Respondents are also manifestly wrong when they say that no relevant legal issues are involved. Fed. Resp. 5. The Eighth Circuit totally ignored the "congressional declaration of a liberal federal policy favoring arbitration." *Moses H. Cone*, 460 U.S. at 24. Unless corrected, this case will stand as a roadblock to arbitration in every case where the presumption favoring arbitration should properly apply to resolve conflicting or ambiguous agreements. The issue is compelling; the circuits' opinions are conflicting; and the decision below is not correct.

2. The Respondents Ignore the Written Arbitration Agreement

Dakota acknowledges that "where the parties have agreed to arbitrate, that agreement [must] be enforced." Dakota Br. in Opp. 7. Dakota claims, however, that the parties in this case "had not agreed to resolve disputes through arbitration." *Id.* at 8. The plain language of the Gas Purchase Agreement says otherwise; the covenant to arbitrate is unequivocal. *See* Pet. App. F-24. The Eighth Circuit held in Dakota's favor not because there was no agreement to arbitrate but because, in its view, the forum selection clause of the Pipeline Affiliates Agreement overrides the explicit promise to arbitrate, despite the fact that the dispute arises out of the Gas Purchase Agreement — not the Pipeline Affiliates Agreement, and notwithstanding the presumption favoring arbitration intended by Congress.

The Eighth Circuit's opinion squarely conflicts with *Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc.*, 819

F.2d 400 (3d Cir. 1987). See Pet. 10-11. Dakota's effort to distinguish that case rests upon its manifestly erroneous claim that, unlike *Patten Securities,* this is *not* a case "where the parties have agreed, by contract, to arbitrate." Dakota Br. in Opp. 9. Of course, this is *precisely* such a case.

Dakota further argues that, unlike *Patten Securities,* "the forum selection clause and the arbitration clause . . . could never be effective at the same time." *Id.* That also is manifestly wrong. The forum selection clause speaks only to enforcement of DOE's rights under the Pipeline Affiliates Agreement, while the arbitration clause speaks to disputes arising under the Gas Purchase Agreement. The two clauses obviously can operate simultaneously.

3. The Respondents Sidestep the Conflict Among the Circuits

There is a difference between this case and *Patten Securities,* but it is one that dramatizes the fundamental conflict between the Third and Eighth Circuits. As the dissenting judge below noted, the *Patten Securities* forum selection clause "did not serve an independent purpose as it does in this case." Pet. App. A-13. The only effect of the *Patten Securities* forum selection clause was to dictate the location of an action to enforce the arbitration award. 819 F.2d at 407. Here, however, the forum selection clause has the independent purpose of fixing the location of actions to enforce DOE's rights under the Pipeline Affiliates Agreement. It stands on its own and facially has nothing to do with disputes under the Gas Purchase Agreement. (Dakota and DOE both feign misunderstanding of this point. *See* Dakota Br. in Opp. 10; Fed. Resp. Br. in Opp. 12 n.7.) This means that there was even *less* reason here than in *Patten Securities* to believe that forum selection nullifies arbitration.

Dakota argues that a "critical difference between this case and *Patten Securities* is that the Secretary of Energy was not a party to

the contract with the arbitration clause *and* lacked the authority to agree to such arbitration." Dakota Br. in Opp. 10 (emphasis in original). The first half of this assertion is plainly false. Indeed, it was the very purpose of the Pipeline Affiliates Agreement to insure that DOE became a party to the Gas Purchase Agreement when it foreclosed upon the plant. *See* Pet. App. B-2. The second half of Dakota's assertion may or may not be true but it is, at bottom, irrelevant. Relying upon intragovernmental legal opinions, DOE similarly claims that it lacked authority to "submit controversies to binding arbitration." Fed. Resp. Br. in Opp. 9; *see also Id.* at 6. Even if this were true, it would simply raise a question regarding arbitration with the DOE during the time it was the owner of the plant. But Dakota, not DOE, is the present owner of the plant. There is nothing in fact or in law to suggest that Dakota, a private contracting party, inherited by assignment any form of governmental immunity allowing it to abrogate written contract provisions with impunity. Because the Gas Purchase Agreement expressly conferred the right and duty to arbitrate, as between petitioner and Dakota this case is on all fours with *Patten Securities* and the Eighth Circuit's decision directly conflicts with it.

4. The Respondents Fail to Address the Real Issue

Dakota contends that review is not warranted because, in other cases, the Eighth Circuit has "recogniz[ed] the liberal federal policy favoring enforcement of arbitration agreements." Dakota Br. in Opp. 12. It is true that in other cases the Eighth Circuit has enforced agreements to arbitrate. But that doesn't prove anything because none of those cases involve the issue decided here and in *Patten Securities*. That issue — the proper treatment of multi-contract agreements containing a forum selection clause in one document and an arbitration clause in another — is one of substantial concern under the Federal Arbitration Act because of the proliferation of such conflicting clauses in modern complex busi-

ness transactions. Respondents totally ignore that issue, but it clearly merits the attention of this Court. *See* Pet. 15-17.

Dakota argues, finally, that the decision below is correct. Dakota Br. in Opp. 13-14. Like the Eighth Circuit, Dakota totally ignores the dispositive text of the Federal Arbitration Act. Section 2 of the Act provides that a provision like the arbitration clause of the Gas Purchase Agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." Neither Dakota, DOE, nor the Eighth Circuit has shown that there is any ground for revocation of the Gas Purchase Agreement or any provision in it. The Third Circuit in *Patten Securities* correctly recognized that the mere presence of a forum selection clause does not constitute ground for revocation and thus does not nullify an express covenant to arbitrate. The Eighth Circuit plainly erred in ruling otherwise. *See* Pet. 11-15.

5. The True Identity of the Proper Parties

Both Dakota and DOE place significant emphasis upon the interests of the DOE as a party to this case. But DOE is no longer a party to the Gas Purchase Agreement, nor is it a party to the dispute between petitioner and Dakota under that agreement. Its presence in this case was succinctly explained by the district court as follows: Dakota, "seeking to bolster its position that the legal action should remain in its home town, added [DOE] as a party plaintiff." Pet. App. B-3. DOE's only interest is as Dakota's secured creditor, and "the presence or absence of [DOE] as a party is without effect as the mortgage documents are no longer applicable." *Id.* at B-4. DOE's strenuous contention that it "has no such obligation [to arbitrate]," Fed. Resp. 15 n.9, is therefore wholly beside the point. No one is trying to drag DOE into an arbitration proceeding against its will.

Nonetheless, DOE opposes certiorari on the ground that it was not a party to the Gas Purchase Agreement, *Id.* at 8, and thus

"was not a party to any contract containing an arbitration clause." *Id.* at 16. That claim is flatly false. When DOE foreclosed on its mortgage, it became a party to the Gas Purchase Agreement, and remained so until its assignment to Dakota. Pet. App. B-2.

Unable to escape this truth, DOE suggests the novel theory that its takeover of the plant effectuated a "modified contractual arrangement," one from which the arbitration clause had been excised. Fed. Resp. 10. That is sheer bootstrapping. DOE resorts to this approach once again trying to distinguish *Patten Securities*: "[i]n contrast to the situation presented in *Patten Securities*, there is no need to reconcile a forum selection clause with an arbitration obligation because here there is no obligation to arbitrate." *Id.* at 14. But DOE's "no obligation to arbitrate" position derives solely and exclusively from the Eighth Circuit opinion that the forum selection clause vitiates the arbitration clause. That is the same circular reasoning employed by Dakota and it is precisely the opposite of what the Third Circuit did in *Patten Securities*. The conflict is manifest.

6. Conclusion

The Federal Arbitration Act mandates that federal courts must "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The Eighth Circuit refused to do so here, reasoning instead that the presence of both a forum selection clause and an arbitration clause creates ambiguity that can appropriately be resolved by reading the arbitration clause out of the agreement. This runs directly counter to the decision of the Third Circuit in *Patten Securities* that any doubts raised by a forum selection clause "must be resolved in favor of arbitrability." 819 F.2d at 407.

The decision below, if left standing, will produce precisely the waste and inefficiencies that Congress sought to avoid through enactment of the Federal Arbitration Act: additional burdens on an already congested federal court system; needless multiplication

of litigation costs; and the frustration of privately negotiated agreements. This Court should grant review in order to enforce and reaffirm the federal statutory presumption favoring arbitration. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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